Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LORRIE ANN HORNER, by and through her father nfr Haskel Horner, et al.

Petitioners,

v.

KENTUCKY HIGH SCHOOL ATHLETIC ASSOCIATION, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under Title IX athletic-equity cases involving female athletes who claim they have been wrongfully denied an opportunity to play a given sport because a high school athletic association promulgated and applied regulations such that the sport is not offered, what intent standard must be proven to recover compensatory damages: "deliberate indifference," or, the more difficult to prove "intentional discrimination"?

In Horner I, the Court of Appeals reversed the summary judgment for the Defendants on Title IX, finding the Plaintiffs had met their burden sufficiently to overcome the motion. Issue: did the Court of Appeals err in Horner II when, faced with exactly the same evidence on Title IX as in Horner I, they nonetheless sustained the subsequent summary judgment given to the Defendants?

PARTIES TO THE PROCEEDING

Petitioners are: LORRIE ANN HORNER, by and through her father nfr Haskel Horner; JULIANA BROWN, by and through her father nfr Michael Brown; JACQUELINE ELSTON, by and through her father Joseph Elston; MARY CHRISTINE WHITELOCK, an adult.[1] Petitioners are individuals and have no corporate affiliations.

Respondents are: The KHSAA (Kentucky High School Athletic Association) and the Kentucky State Board for Elementary and Secondary Education.

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[1] At this time these are the only parties remaining of the original twelve who joined in the original complaint in 1992. The other original plaintiffs have voluntarily withdrawn their claims for the reason that expense, stress, and the passage of time have made it too personally burdensome for them to continue. All are now adults.

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Petitioners respectfully petition for a writ of *certiorari* to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit opinion, Horner II, **(App. A)** is reported at *Horner v. Kentucky High School Athletic Association,* 203 F.3d 685, 142 Ed. Law Rep. 728, 2000 Fed. App. 0096P, (6th Cir. 2000). The second Summary Judgment Memorandum, District Court, September 9, 1997, **(App. B)** is unreported. The Sixth Circuit opinion, Horner I, **(App. C)** is reported at *Horner v. Kentucky High School Athletic Association*, 43 F.3d 265, 96 Ed Law Rep. 389, 1994 Fed. App. 0417P (6th Cir. 1994). The first Summary Judgment Memorandum, January 14, 1993, **(App. D)** is unreported.

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on March 20, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Spending Clause of the United States Constitution as it relates to Title IX of the Education Amendments of 1972, as amended by the Civil Rights

Restoration Act of 1987 (20 U.S.C. 1681). The Spending Clause has been applied such that entities who receive federal funding are held as if under "contract" to comply with relevant statutes. Specifically at issue is how the Spending Clause limits potential defendants under Title IX; how (and if) the Spending Clause limits compensatory damages under Title IX; and what notice and intent standard is required under the Spending Clause's "contract" analysis in order to trigger Title IX liability for entities who accept federal funding

STATEMENT OF THE CASE

In 1992 the Plaintiffs, a group of female student athletes attending Kentucky high schools, filed suit under Title IX and other theories,[2] against the Kentucky High School Athletic Association ("KHSAA") and the Kentucky State Board for Elementary and Secondary Education ("Board"). The Plaintiffs claimed the defendants violated Title IX by creating regulations that contained a presumption against sanctioning women's fast-pitch softball, which is a sport that universities offer athletic scholarships for, and that by creating regulations that denied, or failed to provide, for the

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[2] For purposes of this Petition, only Title IX is in issue. The "other theories" are not at issue in this Petition. The Petitioners concede the point that their claim for injunctive relief is moot in light of subsequent Kentucky laws passed which bring the defendants into compliance with the Title IX athletic-equity mandate. And, as regards "attorney's fees," that issue is not raised before this Court because in the event of remand, it can be litigated at the District Court level. Therefore, the real question remaining is what intent standard must be proven to obtain compensatory damages for Title IX violations.

sanctioning of women's fast pitch softball, the Plaintiffs were disadvantaged by being denied any opportunity to compete for such women's athletic scholarships. KHSAA and the Board created regulations that *did* sanction commensurate men's sports, such as baseball, and thus the defendants had favored men over women, in violation of Title IX, by creating regulations that allowed men the opportunity to learn skills that would allow them to advance to the next level, with all the attendant benefits, while denying women the same opportunity to advance in, or through, their chosen sport.

On January 14, 1993 the District Court granted its first summary judgment to the defendants on all the Plaintiff's claims, including Title IX. See **App. D**, first Summary Judgment Memorandum. Appeal from that summary judgment was taken, with the result that on December 22, 1994 the Sixth Circuit Court of Appeal reversed the District Court on the issue of Title IX. See **App. C**, Horner I, Court of Appeals. *Horner v. Kentucky High School Athletic Association*, 43 F.3d 265, 96 Ed Law Rep. 389, 1994 Fed. App. 0417P (6th Cir. 1994). In Horner I, the Court of Appeals specifically held that "genuine issues of material fact abound in this case, and preclude any determination that defendants have complied with Title IX's equal athletic opportunity mandate." The matter was returned to the District Court on remand.

On September 30, 1997, the District Court granted its second summary judgment to the defendants, and in so doing adopted the Magistrate Court's findings of fact, conclusions of law, and recommendations, which were filed on September 9, 1997. See **App. B.**, second Summary Judgment Memorandum. Appeal was again taken, and on March 20, 2000, the Sixth Circuit Court of Appeals, in a split decision, issued Horner II, *Horner v. Kentucky High School Athletic*

Association, 203 F.3d 685, 142 Ed. Law Rep. 728, 2000 Fed. App. 0096P, (6th Cir. 2000). See **App. A.** It is from this decision of the Court of Appeals, Horner II, **App. A.**, that the Petitioners wish to appeal, and thus this petition.

A.

"DELIBERATE INDIFFERENCE" V. "INTENTIONAL DISCRIMINATION," OR, APATHY V. *ANIMUS*: WHICH STANDARD APPLIES?

The dissent in Horner II, filed by Hon. Judge Nathaniel R. Jones, essentially encapsulates the Petitioner's positions. As the dissent noted, Supreme Court precedent clearly dictates that in analyzing an alleged Title IX athletic-equity violation by creation of regulations that favor high school men over women in sanctioning the playing of a sport, and in the advantages that flow from such sanctioning, a "deliberate indifference" standard should be applied. However, the majority in Horner II, held that "intentional discrimination"--that is actual *animus* and hostility toward women as a group--is the necessary standard for recovering compensatory damages for Title IX violations in athletic-equity.[3] In other words, the majority held that knowing about

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[3] The majority analysis seemed to leave open the possibility of obtaining injunctive relief from Title IX violations under a lower standard than the "intentional discrimination" standard they held was required to recover compensatory damages. One of the key errors complained of by the Petitioners, herein, is that the Court of Appeals has thus created an artificial distinction between the remedies of injunction and compensatory damages when determining what intent standard applies--lower for injunction, but

such disparities, creating regulations that foster and structuralize them, is not alone sufficient to state a Title IX violation without a showing of actual discriminatory *animus* on the part of the school system. As the dissent pointed out, if that is not enough to prove a Title IX violation, then Title IX violations will seldom if ever be provable as a matter of law. In fact, it is the Petitioner's contention such "intentional discrimination", while certainly violative of Title IX, in reality accounts for a minority of Title IX violations. Most Title IX violations result from "deliberate indifference", that is apathy toward women's athletic-equity, rather than an "intentionally discriminatory" purpose to harm women as a group.

The Petitioners seek a holding from this Court, clarifying the intent standard once and for all. The Petitioners seek a holding that where a defendant athletic association knows or reasonably should know there is disparity between sports opportunities and scholarship opportunities as a result of its deliberate creation of regulations that either cause or maintain such disparities, then sufficient intent has been proven to maintain a cause of action alleging a violation of Title IX. Under the Petitioner's proposed analysis, then, a defendant athletic association which *knows* of the disparity, and which *created* the regulations that maintain the disparity, is shown to possess sufficient intent for liability under Title IX.

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higher for compensatory damages. The Petitioners concede that on the issue of *punitive* damages *animus*, or rather the lack thereof, might be a bar to recovery. But on the "make whole" remedy of compensatory damages, the Petitioners believe requiring a showing of *animus* is not required.

The majority's opinion in Horner II has created a higher intent burden to obtain compensatory damages by adding the extra element of *animus*, meaning that knowing of the disparity, and creating regulations that maintain the disparity, would not be enough without the additional showing of actual intention to keep women down. The practical result of this animus requirement to obtain compensatory damages is that seldom, if ever, will compensatory damages be recovered for Title IX violations because seldom, if ever, will be found express acts or statements by school districts necessary to show the *animus* toward female athletes the majority decision holds must be shown. Again, the Petitioners claim that some, probably most, discrimination is the result not of animosity toward the female athletes so much as apathy toward female sports and women's scholarship opportunities in general.

B.

REGARDING THE DISTRICT COURT'S "TECHNICALLY INCORRECT" APPLICATION OF HORNER I, AND THE COURT OF APPEALS ERRONEOUS SANCTIONING OF THAT IN HORNER II.

The Court of Appeals in Horner I reversed the District Court's summary judgment under the Title IX claim finding that issues of fact abounded. See Horner II, (App. A) at *Horner v. Kentucky High School Athletic Association,* 203 F.3d 685, 142 Ed. Law Rep. 728, 2000 Fed. App. 0096P, (6th Cir. 2000), at 687, citing to Horner I, (App. C) *Horner v. Kentucky High School Athletic Association*, 43 F.3d 265, 96 Ed Law Rep. 389, 1994 Fed. App. 0417P (6th Cir. 1994), at 275.

After remand, the District Court again granted summary judgment on Title IX, though the evidence before it was identical to that before it at the time of the previously reversed summary judgment. The District Court's reasoning was that the Court of Appeals in Horner I had held there was no Title IX violation because there was no intentional discrimination. Accordingly, the District Court found that it was the "law of the case" that no Title IX violation was established, and again granted summary judgment on that issue. See **App B**.

However, as the Court of Appeals conceded in Horner II:

> "the district court was technically incorrect in holding that the original panel's decision was "law of the case" as to Plaintiff's Title IX claim. Given the Horner I panel's holding that there were genuine issues of fact regarding a Title IX violation in the first place, a ruling that there was no evidence of intentional discrimination under Title IX would have been premature.

See Horner II, (**App. A**) at *Horner v. Kentucky High School Athletic Association,* 203 F.3d 685, 142 Ed. Law Rep. 728, 2000 Fed. App. 0096P, (6th Cir. 2000), at 694.

The Court of Appeals in Horner I reversed the District Court, and remanded the case to the District Court so that it could deal with the case in its traditional role, as fact-finder. The Horner I opinion overruled the District Court's summary judgment, as a matter of law, on the Plaintiff's Title IX claims, and sent the case back so that the true facts could be determined, i.e., a trial. However, once the case got back

down to the District Court the District Court misread Horner I as stating that as a matter of law there was no Title IX violation (as the Court of Appeals *had* found with regard to the Equal Protection claims). In other words, the District Court misread Horner I as stating that *both* the Equal Protection claim *and* the Title IX claim were invalid as a matter of law, when in fact Horner I only held that the Equal Protection claim was invalid as a matter of law, and remanded for further factual development on the Title IX claim. Because of the District Court's misreading of Horner I[4] it failed consider the evidence and facts underlying the Title IX claim when it issued the second summary judgment because it read Horner I as holding that, as a matter of law, those claims were barred. Horner I sent the case back down to the District Court for findings of fact on the Title IX issue. However, summary judgment was granted with no findings of fact because the District Court misread Horner I, and therefore issued summary judgment purely as a matter of law. The Petitioner's complaint here is that Horner I has never yet been complied with by the District Court, that the District Court erred in misreading Horner I, and the Court of Appeals committed error in allowing that error to stand.

The dissenting Judge, Nathaniel R. Jones, in Horner II, *Id.* 705 (Section IV) (**App. A**), analyzes the Court of Appeals' error on this count so clearly that the Petitioners will draw this Court's attention to that dissenting opinion, and will respectfully submit that it is the correct analysis. As Judge Jones reasoned, by incorrectly reading Horner I as creating a "law of the case" regarding Title IX, when it in fact did not, and by applying that "law of the case," the District Court, in its second summary judgment, erred by finding that as a

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[4] This misreading is conceded by the majority in Horner II.

matter of law the Plaintiff's had not borne their Title IX burden. The error was compounded because, by so holding as a matter of law, the District Court completely failed to conduct the evidentiary analysis that is required of it under the Horner I opinion (**App. C**). It conducted no evidentiary analysis because it incorrectly concluded that the Horner I panel had concluded as a matter of law that the issue was closed. The majority swept these facts aside and held that as a matter of law the Plaintiffs had not met their Title IX burden--exactly opposite the holding of Horner I.

REASONS FOR GRANTING THE WRIT

1.

THE SIXTH CIRCUIT'S "INTENTIONAL DISCRIMINATION" STANDARD IS IN CONFLICT WITH THE "DELIBERATE INDIFFERENCE" STANDARD PROMULGATED BY THE SUPREME COURT IN ANALYZING TITLE IX VIOLATIONS.

The real question here is whether, in a Title IX athletic-equity case, a plaintiff's burden of proving the intent standard is met by showing 1) the defendant knows of the disparity in sports opportunity, and 2) the disparity is maintained by their facially neutral regulation, or whether a third element is required, that being active hostility toward women as a group, i.e., *animus*.

The majority and the dissent in Horner II recognized that the Spending Clause of the United States Constitution has application to a Title IX claim in that by agreeing to accept

federal funds entities essentially contract with the federal government that they will not discriminate on the basis of gender in athletics. Judge Jones, dissent (App. A) at *Horner v. Kentucky High School Athletic Association,* 203 F.3d 685, 142 Ed. Law Rep. 728, 2000 Fed. App. 0096P, (6th Cir. 2000), at 700, citing to *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 118 S.Ct. 1989, 1997, 141 L.Ed.2d 277 (1998).

Essentially, the majority in Horner II held that since entities are made potential defendants under Title IX through acceptance of federal funding, under the contractual funding-for-liability analysis, such potential defendants can only be liable for compensatory damages where their violations are committed *intentionally*--i.e., that intentional deprivation of Title IX rights is the *sin qua non* to compensatory relief for "any type of Title IX violation."[5] *Horner v. Kentucky High School Athletic Association,* 203 F.3d 685, 142 Ed. Law Rep. 728, 2000 Fed. App. 0096P, (6th Cir. 2000), at 689. (App. A).

The majority is correct that in for injunctive relief to lie under Title IX an entity must 1) accept federal funding, (directly or indirectly), and 2) must "know" that a violation of Title IX is occurring. Where the majority erred, to the

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[5] Note the majority's distinction between "knowing" and "intentional." Under the majority's analysis, mere knowledge of disparity is insufficient to recover compensatory damages under Title IX--even if that disparity is known by the defendant and maintained by the defendant's own regulations. Problem: most disparity in athletic-equity cases is not "intentional," but is the result of lack of intent to achieve equity--i.e., apathy rather than *animus*.

great detriment of the Plaintiffs herein, and in fact to all women protected under Title IX, was in holding that such defendants must possess, and be proven to possess, *animus* toward women in order to recover compensatory damages. That simply goes to far, is inconsistent with the language and purpose of Title IX, is inconsistent with the Supreme Court's own holdings, and makes recovering compensatory damages under Title IX practically impossible.[6]

As the dissent correctly pointed out, the Supreme Court has determined that a "deliberate indifference" standard, rather than "intentional discrimination," is the correct intent standard in Title IX cases. Under this deliberate indifference standard, if a defendant intentionally creates a regulation--even one facially neutral[7]–but still knows

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[6] The Plaintiffs again concede that a showing of *animus* might be properly required to recover *punitive* damages, but the Court of Appeals' ruling applied across the board to all money damages, both compensatory and punitive.

[7] For purposes of this analysis the Petitioner's proceed from the premise that the KHSAA regulation, the 25% rule, is, as the majority held, facially neutral. The 25% rule is discussed in Horner I, **App. C.** However, in reality, it is not. The 25% rule created a presumption *against* fast pitch softball, and that presumption could only be overcome, by its own terms, by the affected class--in this case unorganized high school girls who had never even had the opportunity to play the game. This placed a burden on the affected class to overcome, and, respectfully, creating a regulation that places a burden on the affected class in order to achieve athletic-equity with their male peers is not "facially neutral." Had the KHSAA truly intended a facially neutral rule it could have created a presumption *for* sanctioning fast

that the regulation causes or maintains disparity in sports opportunities favoring men over women, that is enough to trigger Title IX liability. See Judge Jones dissent, (App. A) at *Horner v. Kentucky High School Athletic Association,* 203 F.3d 685, 142 Ed. Law Rep. 728, 2000 Fed. App. 0096P, (6th Cir. 2000), at 699, citing to *Davis v. Monroe Co. Bd. of Ed.*, 526 U.S. 629, 119 S.Ct. 1661, 1675, 143 L.Ed.2d 839 (1999).

When these two elements occur--1) when a school creates regulations (even facially neutral ones) that cause or maintain disparity, and 2) the school knows of the disparity--the intent standard is met for imposing liability under Title IX.[8] Both elements exist in this case, yet the majority held that these two elements alone, without *animus*, are insufficient to state a claim for compensatory damages. By raising the bar that extra bit to include an element of *animus* in athletic-equity cases, the majority virtually assures that without express, overt, acts or language by a defendant proving active hostility toward women as a group, no Title IX violation can be proven.

As the dissent stated:

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pitch softball which placed the burden on itself of overcoming the presumption in order not to sanction it. Respectfully, the Petitioner's believe that whether the "25% rule" if facially neutral is a jury question, and if a jury found it was, rather, facially neutral but intentionally discriminatory *as applied*, then even under the majority holding the Petitioners' would meet their burden.

[8] For both injunctive relief *and* compensatory damages.

> "The Supreme Court has defined a discriminatory animus toward women as having "a purpose that focuses upon women by reason of their sex. . . . directed specifically at women as a class."

Judge Jones, dissent, (App. A) at *Horner v. Kentucky High School Athletic Association,* 203 F.3d 685, 142 Ed. Law Rep. 728, 2000 Fed. App. 0096P, (6th Cir. 2000), at 700-701, citing to *Bray v. Alexandria Women's Health Clinic*, 506 U.W.263, 269-70, 113 S.Ct.753, 122 L.Ed.2d 34 (1993).

Stated Judge Jones further:

> "I believe that, short of a defendant actually defying a court injunction, the "animus" standard will almost never be met in a Title IX athletic-equity case."

Id, 701 (App A)., citing to (Cf.) *Guardians Ass'n v. Civil Serv. Comm'n of New York City*, 463 U.W.582, 632, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983)(Marshall, J. dissenting).

Succinctly stated, if the Horner II holding is allowed to stand, then women, at least women in the Sixth Circuit, will seldom, probably never, be able to bear their burden under a Title IX athletic-equity case for the reason that apathy toward women's sports is the real reason for disparity in most school districts rather than *animus* toward women as a group.

2.

THE DISTRICT COURT'S MISREADING OF HORNER I, AND ITS FINDING THAT HORNER I PRECLUDED RECOVERY UNDER TITLE IX AS A MATTER OF LAW.

The Plaintiff's believe they have adequately addressed this important issue above. In short, Horner I remanded the Title IX issue to the District Court for findings of fact, and the District Court granted a second summary judgment with no findings of fact, and without additional analysis of the facts, under its erroneous reading that as a matter of law the Title IX claim was invalid. Both the majority and minority in Horner II acknowledge the District Court's error, but the majority holds it for naught. Respectfully that is improper because Horner I held that the Petitioner's had at least produced enough evidence to overcome summary judgment, and that evidence did not change before the second summary judgment. The Horner II majority opinion that the District Court's error is acceptable is a violation of the Petitioner's due process rights. The summary judgment in regard to Title IX was reversed in Horner I. Implicit in that reversal is a finding that the Plaintiff's have met their burden sufficient to overcome summary judgment, and that in reversing the District Court shall conduct a factual inquiry. The Petitioners *relied* on Horner I, and if Horner II is allowed to stand, that reliance will be to their great detriment. The decision in Horner I established, as a matter of law, exactly the opposite of what the District Court held in its second summary judgment. Under Horner I the Court of Appeals reversed the case because the Plaintiffs had produced enough evidence to proceed to trial. Under that ruling the Plaintiffs were certainly able to gather more evidence, in fact gathering more

evidence might even have been a good thing--but as a matter of law they were not *required* to gather more evidence to overcome a second summary judgment motion, because under Horner I they were assured that with only the evidence before the court that burden was met. We respectfully submit that when a District Court is reversed on its summary judgment and the case is sent back, that it is clear error for the District Court to simply issue a second summary judgment, on the same grounds as the first, under a misreading of the reversing opinion, and a mistaken belief the reversing opinion held that as a matter of law no recovery was possible.

CONCLUSION AND PRAYER

The effect of Horner II, if allowed to stand, will be devastating on young women in the Sixth Circuit who seek athletic-equity in sports opportunities under Title IX. By requiring proof of *animus* to recover compensatory damages, that is actual hostility toward women as a group, rather than apathy toward women's athletic equity and opportunity, the Horner II decision will all but eliminate private Title IX cases. Yes, the lower "deliberate indifference" standard does still seem to allow for injunctive relief, but realistically, what female plaintiff will ever enjoy the benefits of that injunctive relief? What incoming high school freshman girl is going to bring a suit for injunctive relief knowing that even if obtained it probably would not be imposed within the four years left to her in high school? In our society, men are told from early on that they can strive and achieve great things through sports--not just the playing of sport itself--but the benefits attendant to playing sports, such as funding in the form of athletic scholarships, without which many men would not be able to afford advancement to college. And not just scholarships, but even playing professionally, and for the

amateur, a lifetime of health and enjoyment. When we talk about compensatory damages we are not talking about damages to punish Title IX violators, we are talking about damages to compensate women who have been wrongfully denied the same opportunities for advancement and enjoyment through sports as their male counterparts have enjoyed for decades. In many cases we are literally talking about the financial ability to attend college, and the wrongful denial of that financial ability through violation of Title IX's athletic equity mandate. By requiring *animus* to recover compensation for wrongful denial of sports opportunities, Horner II essentially allows a wrong without a remedy. The result is the unacceptable scenario that women can be wrongfully denied opportunity, yet have no "make whole" remedy if the violation is proven to have occurred.

Further, as noted, the Court of Appeals analysis and holding is contrary to multiple rulings issued by this Court.

For all the foregoing reasons, we pray this court will issue a writ of *certiorari* on what is undoubtedly the most important Title IX case to have come before it on the issue of athletic-equity for women.

Respectfully submitted,
/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

[Filed March 20, 2000]

No. 97-6264

Lorrie Ann HORNER, by and through her father nfr Haskel Horner; Jennifer Baker, by and through her father nfr Douglas Baker; Juliana Brown, by and through her father nfr Michael Brown; Angella Chaffin, by and through her father nfr Dale Chaffin; Tracy Dotson, by and through her father nfr Sherman Dotson; Jacqueline Elston, by and through her father Joseph Elston; Amy Hacker, by and through her father nfr Chris Hacker; Elizabeth Suzanne Hartlage, an adult; Kelly Johnson, by and through her father nfr Charles Johnson; Mary Christine Whitelock, an adult,	)
Plaintiffs-Appellants,	)
	)

Leslie Burgett, by and through her father nfr Billy Burgett; Barrie Wagers, by and through her father nfr Lyde Wagers,
Plaintiffs,

v.

KENTUCKY HIGH SCHOOL ATHLETIC ASSOCIATION; Kentucky State Board for Elementary and Secondary Education, Defendants
Appellees.

Argued Feb. 3, 1999

Before: JONES, NORRIS, and SUHRHEINRICH, Circuit Judges.

SUHRHEINRICH, J., delivered the opinion of the court, in which ALAN E. NORRIS, J., joined. NATHANIEL R. JONES, J. (pp. 698-706), delivered a separate dissenting opinion.

OPINION

SUHRHEINRICH, Circuit Judge.

Plaintiffs, a group of female student athletes attending Kentucky high schools, appeal following remand from the

district court's order granting summary judgment to Defendant state school board and school athletic association on Plaintiffs' claim of sexual discrimination under Title IX of the Education Amendments of 1972, as amended by the Civil Rights Restoration Act of 1987 (20 U.S.C. § 1681) ("Title IX"). Plaintiffs also appeal the denial of their post-judgment motion for attorneys' fees. We AFFIRM.

I. BACKGROUND

In 1992, Plaintiffs sued Defendants Kentucky High School Athletic Association ("Association") and the Kentucky State Board for Elementary and Secondary Education ("Board"), claiming that the Association's failure to sanction fast-pitch softball violated the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. § 1983, Title IX, Section 3 of the Constitution of the Commonwealth of Kentucky, and Title XXVII, Labor and Human Rights, Chapter 344, Civil Rights (Ky.Rev.Stat.Ann. § 344.020(1)(b) (Banks-Baldwin *688 1997)). Specifically, Plaintiffs alleged that Defendants' failure to sponsor fast-pitch softball for female students diminished the ability of female student athletes to compete for college fast-pitch softball athletic scholarships when compared with male student athletes who played high school baseball and then competed for college baseball athletic scholarships. Plaintiffs requested declaratory and injunctive relief sanctioning fast-pitch softball for girls, compensatory damages, certification as a class, attorneys' fees, and costs.

The Board and Association defended on the basis of its "25 percent" rule, whereby a new sport would not be sanctioned unless at least 25 percent of the member schools indicated a willingness to participate. At the time the lawsuit

was filed, two surveys, in 1988 and 1992 respectively, revealed that the member schools indicated only a 9 percent (1988) and a 17 percent (1992) interest in fast-pitch softball for girls.

The district court granted Defendants' motions for summary judgment, holding that: (1) Defendants had complied with Title IX because they had offered equal opportunities in accordance with the interests and abilities of students; and (2) Defendants had complied with the Equal Protection Clause because they permitted students to participate in sanctioned sports without gender restriction. Plaintiffs appealed, and this Court affirmed in part and reversed in part. *See Horner v. Kentucky High School Athletic Ass'n*, 43 F.3d 265 (6th Cir.1994) (Horner I).

Horner I affirmed the judgment for Defendants on Plaintiffs' equal protection claim because Plaintiffs failed to prove that Defendants intentionally discriminated against them, as required by the Equal Protection Clause. *See id.* at 276. The court held that Plaintiffs had not alleged that Defendants adopted or adhered to the 25 percent rule because of rather than in spite of its disparate impact on females and that sheer disparate impact is insufficient to demonstrate an equal protection violation. The Horner I panel reversed the judgment for Defendants on Plaintiffs' Title IX claim, however, finding that issues of fact "abound[ed]." *See id.* at 275.

While Plaintiffs' first appeal was pending in this Court, the Kentucky General Assembly amended the statute regulating high school sports. *See* Ky.Rev.Stat. § 156.070(2) (Banks-Baldwin 1995) (effective July 15, 1994). Where a

school offered one of two similar sports, the amended statute directed the Board and the Association to promulgate regulations to offer the sport for which the National Collegiate Athletic Association ("NCAA") offers athletic scholarships. In response to the passage of § 156.070(2), the Association amended its Bylaw 40, to state:

> If a member school sponsors or intends to sponsor an athletic activity that is similar to a sport for which NCAA members offer an athletic scholarship, the school shall sponsor the athletic activity or sport for which the scholarships are offered. The athletic activities which are similar to sports for which NCAA members offer scholarships are: Girls' fast pitch softball as compared to slow pitch.

KHSAA Bylaws, Div. IV, Bylaw 40.[1]

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[1] The following language was added to this bylaw, effective for the 1995-96 school year:

> To qualify as having "sponsored" a sport, a school must be able to demonstrate the following:
>
> (1) If similar versions of a particular sport exist and there are differences in the scholarship opportunities at the NCAA level in that sport, a survey must be taken of the student population at reasonable times and places to determine the level of interest in the sport(s).
>
> (2) If said survey reveals sufficient interest to field the normal squad required for play in the particular sport and if any version of the sport is to be played, the school shall make facilities, staff, and other allowances to properly field a team in the

On remand, the district court again granted summary judgment for Defendants. The district court held that: (1) Plaintiffs' claims for class certification, injunctive relief, and declaratory relief under Title IX were moot because of the amendment to Ky.Rev.Stat. Ann. § 156.070; (2) the Title IX claims of Plaintiffs who had graduated were also moot; and (3) Plaintiffs' claims for monetary damages under Title IX failed because Plaintiffs had presented no evidence of intentional discrimination.

Plaintiffs moved to alter judgment and also moved for attorneys' fees. The district court denied both motions. Regarding attorneys' fees, the district court found that Plaintiffs had received no relief on the merits of their claim, and that there was no proof that Plaintiffs had been the catalyst for Defendants' policy change. Plaintiffs appeal.

II. DISCUSSION

On appeal, Plaintiffs challenge the district court's refusal to grant money damages under Title IX and its denial of their request for attorneys' fees.

A. Compensatory Damages

Plaintiffs argue that the district court erred in granting summary judgment because the Horner I panel did not hold that there was no evidence of intentional discrimination by

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version of the sport for which the NCAA members offer scholarships.

KHSAA Bylaw 40 _ 2(1), (2).

Defendants regarding Title IX. Plaintiffs further contend that Title IX does not require intentional discrimination to recover damages. Finally, Plaintiffs argue that if monetary damages are premised upon a finding of intentional discrimination, Defendants' gender-based classification meets that standard. We address Plaintiffs' second argument first.

1. Intent Requirement

Plaintiffs contend that a lack of intentional discrimination does not always preclude a plaintiff from recovering money damages under Title IX. Plaintiffs' claim notwithstanding, proof of intent, however defined, is the *sine qua non* to compensatory relief for any type of Title IX violation. A brief history of the key Title IX cases makes that clear. In all of the relevant cases, the Supreme Court has consistently invoked a "contract" rationale: that under Spending Clause legislation, the relationship between the government and the federal funding recipient is consensual. A recipient should therefore not be subject to money damages unless it has notice that it will be liable for the conduct at issue.

In 1979, the Supreme Court first construed an implied private right of action under Title IX. *See Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). The Court reasoned that because Title IX was patterned after Title VI of the Civil Rights Act of 1964, which has been construed as containing an implied private right of action, "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been [interpreted and applied]." *Id.* at 696, 99 S.Ct. 1946. *See also Guardians Ass'n v. Civil Serv. Comm'n of*

New York City, 463 U.S. 582, 594, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983) (plurality) (noting that a major part of the analysis in Cannon was "that Title IX had been derived from Title VI, that Congress understood that private remedies were available under Title VI, and that Congress intended similar remedies to be available under Title IX").

The relationship between monetary damages and proof of intent emerged in Guardians, a Title VI case. There, Black and Hispanic police officers sued for damages under Title VI, alleging that their layoffs under the police department's last-hired, first-fired policy were discriminatory. The plaintiff officers claimed that the policy disproportionately affected them because they had lower scores on qualifying examinations than White applicants and accordingly were hired later than higher scoring White applicants. Thus, when it came layoffs, Black officers were laid-off before White officers who had been hired before plaintiffs because of their higher qualifying examinations. The district court acknowledged the discriminatory impact of the policy but, nevertheless, found that the plaintiffs failed to prove that the defendant had acted with discriminatory intent.

The plaintiffs appealed the issue of whether Title VI requires proof of discriminatory intent. *See id.* at 584, 103 S.Ct. 3221. Although a fractured ruling, a majority of the Court held that Title VI supports a private right of action providing limited declarative and injunctive relief for unintentional violations. *See id.* at 602, 103 S.Ct. 3221. A different majority of the Court rejected the plaintiffs' argument that monetary damages were available for

unintentional discrimination.[2] Although his rationale for this ruling did not gain a majority, Justice White explained that:

> We have also indicated that "make whole" remedies are not ordinarily appropriate in private actions seeking relief for violations of

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[2] Justice White explained the fractured votes as follows:

> Despite the numerous opinions, the views of at least five Justices on two issues are identifiable. The dissenters, Justices BRENNAN, MARSHALL, BLACKMUN, AND STEVENS, join with me to form a majority for upholding the validity of the regulations incorporating a disparate-impact standard. *See* n.2, *supra*. A different majority, however, would not allow compensatory relief in the absence of proof of discriminatory intent. Justice REHNQUIST and I reach this conclusion directly. *See* Parts II and IV, supra; post, 103 S.Ct. at 3237 (REHNQUIST, J., concurring in the judgment). Justice POWELL, joined by THE CHIEF JUSTICE, post 103 S.Ct. at 3235, believe that no private relief should ever be granted under Title VI under any circumstances. Justice O'CONNOR, post, 103 S.Ct. at 3237, would hold that all relief should be denied unless discriminatory intent is proven. It follows from the views of these latter three Justices that no compensatory relief should be awarded if discriminatory animus is not shown.

Id. at 607 n. 27, 103 S.Ct. 3221 (White, J.).

> statutes passed by Congress pursuant to its "power under the Spending Clause to place conditions on the grant of federal funds." *Pennhurst State School v. Halderman*, 451 U.S. 1, 15, 101 S.Ct. 1531, 1539, 67 L.Ed.2d 694 (1981). This is because the receipt of federal funds under typical Spending Clause legislation is a consensual matter: the State or other grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt. . . .

Id. at 596, 103 S.Ct. 3221 (White, J.).

In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 74, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992), the Supreme Court explicitly established that the implied right of action under Title IX in Cannon provides a damages remedy. In *Franklin*, a student sued a school district under Title IX, alleging that the school district knew that she had been sexually harassed by a teacher, but did nothing. The Court held that damages were not available for Title IX violations from the school district unless the discrimination was intentional. Significantly, *Franklin* characterized the holding of Guardians the following way:

> Though the multiple opinions in Guardians suggest that the difficulty of inferring the common ground among the Justices in that case, a clear majority expressed the view that damages were available under Title VI in an action seeking remedies for an intentional

> violation, and no Justice challenged the traditional presumption in favor of a federal court's power to award appropriate relief in a cognizable cause of action.

Id. at 70, 112 S.Ct. 1028.

Justice White, this time writing for the majority, applied the same Spending Clause analysis to Title IX that he used in Guardians under Title VI:

> In *Pennhurst State School and Hospital v. Halderman*, . . . the Court observed that remedies were limited under such Spending Clause statutes when the alleged violation was unintentional. Respondents and the United States maintain that this presumption should equally apply to intentional violations. We disagree. The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. . . . This notice problem does not arise in a case such as this, in which intentional discrimination is alleged.

Franklin, 503 U.S. at 74-75, 112 S.Ct. 1028 (citation omitted) (emphasis added). *Franklin* did not, however, define the contours of the school district's liability in such a situation.

Gebser v. Lago Vista Independent School District, 524 U.S. 274, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998) took up

that task. *See id.* 118 S.Ct. at 1995. There the Court held that a school district may be held liable for damages under Title IX, but only if the district had "actual notice" and was "deliberately indifferent" to the underlying violation. *See id.* at 1999. In *Gebser*, a high school student and her parents sued a school district for damages under Title IX, alleging that a teacher sexually harassed her. The Supreme Court rejected the use of agency or negligence principles to render the school district liable for monetary damages under Title IX. *See id.* at 1997 ("we conclude that it would 'frustrate the purposes' of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment based on principles of *respondeat superior* or constructive notice, *i.e.*, without actual notice to a school district official"). Observing once again that Title IX was modeled after Title VI, Justice O'Connor, writing for the majority, invoked the "contract" rationale of Guardians:

> Title IX's contractual nature has implications for our construction of the scope of available remedies. When Congress attaches conditions to the award of federal funds under its spending power, as it has in Title IX and Title VI, we examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition. Our central concern in that regard is with ensuring "that the receiving entity of federal funds [has] notice that it will be liable for a monetary award." Justice White's opinion announcing the Court's judgment in *Guardians Assn. v Civil Serv. Comm'n of New York City*, for instance, concluded that the

> relief in an action under Title VI alleging unintentional discrimination should be prospective only, because where discrimination is unintentional, "it is surely not obvious that the grantee was aware that it was administering the program in violation of the [condition]." We confront similar concerns here. If a school district's liability for a teacher's sexual harassment rests on principles of constructive notice or *respondeat superior*, it will likewise be the case that the recipient of funds was unaware of the discrimination. It is sensible to assume that Congress did not envision a recipient's liability in damages in that situation.

Gebser, 118 S.Ct. at 1998 (citations omitted).[3]

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[3] The *Gebser* court also explained the distinction between Title IX and VII:

> That contractual framework distinguishes Title IX from Title VII, which is framed in terms not of a condition but of an outright prohibition. Title VII applies to all employers without regard to federal funding and aims broadly to "eradicat[e] discrimination throughout the economy." *Landgraf v. USI Film Products*, 511 U.S. 244, 254, 114 S.Ct. 1483, 1491, 128 L.Ed.2d 229 (1994) (internal quotation marks omitted). Title VII, moreover, seeks to "make persons whole for injuries suffered through past discrimination." Ibid. (internal quotation marks omitted). Thus,

Most recently, in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999), the Supreme Court considered whether a damages action under Title IX will lie against a school board for student-on-student harassment. Consistent with its earlier cases, the *Davis* Court held that private damages actions are available only where federal funding recipients act with "deliberate indifference" to "known" acts of harassment. Again, the Court reasoned:

> This Court has indeed recognized an implied private right of action under Title IX, *see Cannon v. University of Chicago, supra*, and we have held that money damages are available in such suits, *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992). Because we have repeatedly treated Title IX as

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> whereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on "protecting" individuals from discriminatory practices carried out by recipients of federal funds. *Cannon, supra*, at 704, 99 S.Ct., at 1961- 62. That might explain why, when the Court first recognized the implied right under Title IX in Cannon, the opinion referred to injunctive or equitable relief in a private action, *see* 441 U.S., at 705, and n. 38, 710, n. 44, 711, 99 S.Ct., at 1962, and n. 38, 1964, n. 44, 1965, but not to a damages remedy.

Gebser, 118 S.Ct. at 1997-98.

> legislation enacted pursuant to Congress' authority under the Spending Clause, however, *see, e.g., Gebser v. Lago Vista Independent School, supra*, at 287, 118 S.Ct. 1989 (Title IX); *Franklin v. Gwinnett Public County Schools, supra*, at 74-75, and n. 8, 112 S.Ct. 1028 (Title IX), *see also Guardians Assn. v. Civil Serv. Comm'n of New York City*, 463 U.S. 582, 598-99, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983) (opinion of White, J.) (Title VI), private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue. When Congress acts pursuant to its spending power, it generates legislation "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). In interpreting language in spending legislation, we thus "insis[t] that Congress speak with a clear voice, 'recognizing that "[t]here can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it."'" *Ibid; see also id.*, at 24-25, 101 S.Ct. 1531.

Id. at 639-40, 119 S.Ct. at 1669-70. Davis thus extended the rule of *Gebser* to student-on-student sexual harassment when

the school officials are aware of the misconduct but do nothing to stop it, despite its ability to exercise control over the situation.

In sum, although the Supreme Court has not yet expressly ruled on the point, we think that it would likely hold that proof of intentional discrimination is a prerequisite for money damages under Title IX when a facially neutral policy is challenged under a disparate impact theory. As the preceding discussion illustrates, the Supreme Court has consistently applied Justice White's Spending Clause analysis as first articulated in Guardians in its Title IX decisions. Given the consensual relationship between federal agency and recipient, the recipient must be aware of the conditions attached to the receipt of those funds. As Justice White remarked in Franklin, "The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award." *Franklin*, 503 U.S. at 74, 112 S.Ct. 1028. The dissent, in suggesting that we are ignoring Title IX's remedial purposes, completely ignores this countervailing interest, which the intent requirement seeks to accommodate. Thus, we conclude that compensatory damages under Title IX are available when a facially neutral policy is challenged only if an intentional violation is shown.

This leaves the question of what standard to apply to determine intent when a facially neutral policy is challenged. Currently, the only clear test in the Supreme Court is that of "deliberate indifference." However, the cases from which that test arose, *Franklin, Gebser*, and *Davis*, all address deliberate indifference to sexual harassment, and are not readily analogous to the present situation. *See Pederson v.*

Louisiana State Univ., 201 F.3d 388, 412-13 (5th Cir.2000). In those cases the school district was sued for its failure to prevent its agents from sexually harassing a student (or engaging in some other form of misconduct). Thus, "intent" in that context means "actual notice" of the abuse by a third party and a failure to stop it.

This case is the Title IX equivalent of *Guardians*. In *Guardians*, the district court acknowledged the disparate impact of the defendant police department' employment policies but did not impose liability for damages because the policies were not intentionally discriminatory. However, as the dissent notes, only Justice White advocated a standard for intentional discrimination when a facially neutral policy is challenged, that of "discriminatory animus." *See Guardians*, 463 U.S. at 584, 103 S.Ct. 3221 (White, J.) ("I conclude that . . . in the absence of proof of discriminatory animus, compensatory relief should not be awarded to private Title VI plaintiffs"); *id.* at 607 n. 27, 103 S.Ct. 3221 (same). The dissent nonetheless advocates the "deliberate indifference" of *Franklin, Gebser*, and *Davis*; and criticizes the discriminatory animus standard as "overdemanding," "near[ly] insurmountable," and "antithetical to the remedial purposes of Title IX."

We can envision various scenarios in which the discriminatory animus and deliberate indifference tests might help establish "intent" under Title IX when a facially neutral policy is challenged.[4] However, because of Plaintiffs'

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[4] For example, a deliberate indifference test might be appropriate when Plaintiffs claim that defendant school officials had actual knowledge of the disparate impact of their policies, either at

fundamental failure to establish a violation of Title IX, let

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the time of enactment or when subsequently brought to their attention post-enactment, and turn a blind eye. We can also perceive school officials adopting a policy simply because of gender bias, without empirical evidence of disparate effect. In this situation, we do not think that the deliberate indifference test works, because it would be difficult for Plaintiffs to prove actual knowledge of disparate impact. The discriminatory animus test, albeit a stricter standard, might help Plaintiffs establish the requisite intent.

Recently, the Fifth Circuit held that the deliberate indifference test applied in Title IX sexual harassment cases "ha[s] little relevance" in determining whether an academic institution intentionally discriminated on the basis of sex by failing to accommodate female athletes. *See Pederson v. Louisiana State Univ.*, 201 F.3d 388, 412-13 (5th Cir.2000). According to *Pederson*, "[t]he proper test is not whether [the school district] knew of or is responsible for the actions of others, but whether [the school district] intended to treat women differently on the basis of their sex by providing them unequal athletic opportunity." *Id.* As the *Pederson* court observed, classifications based on "archaic" assumptions are facially discriminating, and "actions resulting from an application of these attitudes constitutes intentional discrimination." *Id.* at 411- 12. However, as discussed, this case offers no proof of intentional discrimination.

alone an intentional violation,[5] we need not adopt any test at this time. This brings us to Plaintiffs' second contention.

2. Plaintiffs' Proofs

In holding that Plaintiffs's Title IX claim for compensatory damages failed for lack of proof of intentional discrimination, the district court held that:

> It is clear, as a matter of the law of the case, that there was no intentional discrimination by defendants in this case. *Horner v. Kentucky High School Ass'n.*, 43 F.3d 265, 276 (6th Cir.1994).[3]
>
> [3] The Sixth Circuit determined that plaintiffs failed to offer sufficient evidence on the issue of intentional discrimination to defeat defendants' motion for summary judgment on the Equal Protection Claim. Plaintiffs have not offered any additional evidence regarding intentional discrimination since the case was remanded from the Sixth Circuit.

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[5] For this reason, we disagree with the dissent's contention that "[a]n answer to [the] question [of whether the district court correctly concluded that the plaintiffs produced no evidence of 'intentional discrimination'] will depend entirely on the definition of 'intentional discrimination' within the meaning of Title IX."

(J.A. 340.)[6] Plaintiffs contend that this ruling is wrong because the Horner I panel's ruling pertained only to their Equal Protection Claim; and furthermore, that the Sixth Circuit explicitly held that Plaintiffs had made their *prima facie* case under Title IX.

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[6] In the first appeal of this case, this Court, relying on *Personnel Administrator v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979), recognized that discriminatory intent requires a showing that the challenged policy was adopted "because of, not merely in spite of, its adverse impact on persons in the . . . class." *Horner*, 43 F.3d at 276 (citing *Feeney*, 442 U.S. at 279, 99 S.Ct. 2282) (emphasis added).

Applying this rule, the Horner I panel ruled that:

> Plaintiffs did not allege that defendants adopted or adhered to the 25 percent rule because of rather than in spite of its disparate impact on females. Nor did they come forward with evidence of discriminatory intent, such as a tainted historical background of the rule, or a circumstantially suspicious sequence of events leading up to the rule. In short, plaintiffs claimed only that sheer disparate impact was sufficient to demonstrate an equal protection violation. This simply was not enough to defeat the defendants' motion for summary judgment.

Id. (internal citation omitted).

Plaintiffs are correct that the ruling in Horner I regarding intentional discrimination pertained only to their equal protection claim. Thus, the district court was technically incorrect in holding that the original panel's decision was "law of the case" as to Plaintiffs' Title IX claim. Given the Horner I panel's holding that there were genuine issues of fact regarding a Title IX violation in the first place, a ruling that there was no evidence of intentional discrimination under Title IX would have been premature. This, however, brings us to Plaintiffs' contention that our previous decision found that they had stated a *prima facie* case under Title IX. That is not correct, as an examination of our original decision reveals.

Initially, Horner I discussed the analysis to be used in determining whether Defendants had complied with Title IX's equal opportunity mandate.[7] The Horner I panel noted that the regulations implementing the statute's nondiscriminatory requirements "do not impose an independent requirement that an institution always sponsor separate teams for each sport it sanctions." *Id.* at 273 (citing 34 C.F.R. § 106.41(b)). The panel also noted that "the regulations do require that institutions provide gender-blind equality of athletic opportunity to its students." *Id.* (citing 34 C.F.R. § 106.41(c)). This requires an evaluation of several factors, including "'[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities

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[7] Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" 20 U.S.C. § 1681(a).

of members of both sexes[.]'" *Id.* (quoting 34 C.F.R. § 106.41(c)(1)).

In making this assessment, the Horner I panel deferred to the Department of Health, Education, and Welfare's Policy Interpretation of 1979. *See id.* To satisfy the effective accommodation requirement of 34 C.F.R. § 106.41(c)(1), "an institution must effectively accommodate the interests of both sexes in both the selection of the sports and the levels of competition, to the extent necessary to provide equal athletic opportunity." *Id.* (citing Policy Interpretation, Section VII.C.1., 44 Fed.Reg. at 71,417) (emphasis added).

Regarding the interests of the students, Horner I noted that "the Policy Interpretation instructs that the methods chosen by the institution must be nondiscriminatory and must not disadvantage members of an underrepresented sex." *Id.* (citing Policy Interpretation, Section VII.C.3., 44 Fed.Reg. at 71,417). The court held:

> The district court found that plaintiffs have an unrestricted opportunity to compete based upon the interests of the member schools. However, the interests of the member schools is not necessarily identical with that of the students, a question on which the record is completely silent. At best, the record reflects that 17 percent of the member schools were interested in having fast-pitch softball sanctioned. The interest of female students at other schools is unknown, because there is no information regarding whether the member schools polled their students before

> responding, or failing to respond, to the KHSAA's survey.

Id. (emphasis added).

Regarding the selection of sports, the Horner I panel noted that Title IX Plaintiffs must establish that:

> (1) The opportunities for members of the excluded sex have historically been limited;
> (2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team; and
> (3) Members of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or to compete actively on such team if selected.

Id. at 274 (quoting Policy Interpretation, Section VII.C.4.b., 44 Fed.Reg. at 71,418).

Regarding these factors, the Horner I panel held that there was record evidence to support the first requirement, but not the second or third:

> With respect to subsection (1), there is evidence in the record that the opportunities for girls were, and are, more limited than those for boys. With respect to subsection (2), the level of interest of all high school girls in fast-pitch softball is unknown. With respect to

> subsection (3), the record reflects only that girls are not prohibited from playing on the boys' baseball teams. The record does not disclose whether and to what extent girls actually play.

Id. at 274 (emphasis added). Thus, contrary to Plaintiffs' assertions on appeal, this court did not hold in Horner I that Plaintiffs had met their initial burden.

The panel also set forth the factors in the Policy Interpretation to assess an institution's effective accommodation of the students' interest in the selection of the levels of competition:

> (1) Whether the intercollegiate level participation opportunities for males and female students are provided in numbers substantially proportionate to their respective enrollments; or
> (2) Where the numbers of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex;
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of

> the members of that sex have been fully and effectively accommodated by the present program.

Id. (quoting Policy Interpretation, Section VII.C.5.a, 44 Fed.Reg. at 71,418).

Regarding these factors, the original panel noted that:

> The plaintiffs bear the burden of proof on subsection (1), that of showing statistical disparity.[8] *Roberts*, 998 F.2d at 828; *Cohen*, 991 F.2d at 901. Substantial proportionality provides a safe harbor for recipients of federal funds. . . . If the plaintiffs prove disparity, then the institution must show that it satisfies subsection (2). If it fails here, the plaintiffs may prevail by sustaining their burden of proof under subsection (3) and demonstrating an unmet interest on the part of the underrepresented sex. *Roberts*, 998 F.2d at 830-31; *Cohen*, 991 F.2d at 901. Subsection (3) "'sets a high standard: it demands not merely some accommodation, but full and effective accommodation. If there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution

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[8] Although the record is silent on this point, the court was informed at oral argument that 33,891 boys (65 percent) participate in sanctioned sports in Kentucky, while only 18,860 girls (34.8) percent participate.

> necessarily fails this prong of the test.'" *Roberts*, 998 F.2d at 831-32 (quoting *Cohen*, 991 F.2d at 898).

Id. at 275 (emphasis added). We therefore concluded that:

> It is evident that genuine issues of material fact abound in this case, and preclude any determination that defendants have complied with Title IX's equal opportunity mandate. We therefore reverse the district court's entry of summary judgment on plaintiffs' Title IX claims.

Id. Again, the Horner I panel did not hold that Plaintiffs had met their burden under Rule 56 of the Federal Rules of Civil Procedure. In fact, we specifically noted that the record was silent on statistical disparity. The only proof Plaintiffs offered on remand was that of statistical disparity, in support of their statements at oral argument. Plaintiffs offered no proof on remand that their interests were not being met, despite the policy allowing them to play on boys' fast-pitch softball teams. As the dissent in Horner I observed: "Title IX, when read with the implementing regulation and the policy interpretation, places the burden of proving statistical disparity and unmet interest squarely on the shoulders of the plaintiffs." *Id.* at 277 (Batchelder, J., dissenting) (citing *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 829 n. 5 (10th Cir.1993); *Cohen v. Brown Univ.*, 991 F.2d 888, 901-01 (1st Cir.1993)).

In sum, the Horner I panel did not hold that Plaintiffs made out a prima facie case of a Title IX violation, but merely

held that Plaintiffs had established the first requirement of their *prima facie* case. Notably, the Horner I panel specifically advised Plaintiffs of the proof necessary to prevail on their Title IX claim, and granted a remand for further development of the record. Notwithstanding, upon renewed motions for summary judgment by Defendants, other than proof of statistical disparity, Plaintiffs still failed to offer any additional evidence that Title IX's equal opportunity mandate had been violated, let alone intentionally violated. Absent a predicate violation, it is axiomatic that there can be no intentional violation of Title IX. Thus, in the language of the dissent, there can be no "actual notice" and "deliberate indifference" to Plaintiffs' unmet interest. We therefore affirm the district court's grant of summary judgment, although on slightly different grounds.

Nevertheless, even if we assumed that Plaintiffs had established their *prima facie* case, we would still hold that they failed to establish an intentional violation. Certainly, on this record, there is no evidence of discriminatory animus. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269-70, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) (defining discriminatory animus towards women in an action under 42 U.S.C. § 1885(3) as having "a purpose that focuses upon women by reason of their sex . . . directed specifically at a women as a class"); *Feeney*, 442 U.S. at 279, 99 S.Ct. 2282 (stating in the equal protection context that "'discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences"). Plaintiffs offered no evidence of discriminatory intent.[9] Nor is there any proof under the

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[9] As we noted in the equal protection context in Horner I:

dissent's proposed standard. Plaintiffs have simply not established that Defendants had actual knowledge of the discriminatory effect of their facially neutral rule, yet failed to remedy the violation. In any event, Plaintiffs' and the dissent's position is really a "constructive" notice argument under the guise of the deliberate indifference test: Because there was a boys' fast-pitch softball team and not a girls' fast-pitch softball team, Defendants must have known that they were treating girls differently than boys; Defendants, as federal funding recipients, are charged with notice of the Title IX law, which prohibits gender discrimination; Defendants were therefore in knowing violation of Title IX.

This reasoning is flawed because it reads Title IX as requiring perfect parity. However, as just discussed, all the statute and implementing regulations require is equality of

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> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action – whether it "bears more heavily on one race than another,"– may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even though the governing legislation appears neutral on its fact. The evidentiary inquiry is then relatively easy. But such cases are rare.

Horner I, 43 F.3d at 276 (quoting *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)).

athletic opportunity. The statute itself does not require gender balance. *See* 20 U.S.C.A. § 1681(b)(West 1990) (providing that "[n]othing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area"); *Roberts*, 998 F.2d at 829 n. 5. Further, in certain instances, separate teams for males and females are allowed. *See* 34 C.F.R. § 106.41(b) (1998) (permitting separate sports teams for males and females where selection for the team is based on competitive skill or is a contact sport). As we pointed out in Horner I, the regulations themselves do not impose an independent requirement that an institution always sponsor separate teams for all sanctioned sports. *See Horner I*, 43 F.3d at 273 (citing 34 C.F.R. § 106.41(b)). Thus, it would be impossible for Defendants to be on notice that they were in violation of Title IX simply because they sponsored only boys' fast-pitch softball. Finally, it is undisputed that Defendants permit female athletes to try out for traditional male sports, including contact sports. Absent any evidence that this opportunity did not adequately meet girls' needs and abilities, there can be no finding that Defendants knowingly violated Plaintiffs' Title IX rights.

3. Gender Classification

For the first time on appeal, Plaintiffs argue that Defendants violated Title IX because the KHSAA classifies its

sports by gender. For the reasons stated, classification by gender is not a per se violation of Title IX. In any event, the claim is forfeited.

B. Attorneys' Fees

Plaintiffs also claim that they are prevailing parties for purposes of awarding attorneys' fees. This Court reviews the factual determination that a party is a prevailing party for clear error. *See Payne v. Board of Educ., Cleveland City Schools*, 88 F.3d 392, 397 (6th Cir.1996). This Court reviews the denial of a motion for attorneys' fees for an abuse of discretion. *See Jones v. Continental Corp.*, 789 F.2d 1225, 1229 (6th Cir.1986).

To recover attorneys' fees under 42 U.S.C. § 1988, a party must be a prevailing party. To be a prevailing party, a party must receive at least some relief on the merits of his claim such as a judgment, an injunction, or a consent decree. *See Hewitt v. Helms*, 482 U.S. 755, 760-61, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987).

Plaintiffs claim that Defendants changed their policies and practices because of their lawsuit. The District Court, however, found no evidence for this claim. The record reflects that Defendants changed their policies only after the Kentucky General Assembly amended Ky.Rev.Stat. § 156.070, directing Defendants to promulgate regulations to provide fast-pitch softball. Plaintiffs offered no record evidence that their lawsuit caused the Kentucky General Assembly to amend Ky.Rev.Stat. § 156.070. The district court's finding that Plaintiffs were not prevailing parties is, therefore, not clearly erroneous.

Nevertheless, a plaintiff who is not a prevailing party under § 1988, may also recover attorneys' fees if the lawsuit was the primary "catalyst" for causing a defendant to change its conduct favorably toward the plaintiff. *See Payne*, 88 F.3d at 397. he catalyst theory applies a two- part test. First, the plaintiff's lawsuit must be a necessary and important factor in achieving the relief sought. Second, the plaintiff must prove that the changed conduct was required because of a violation of the law. *See id.* at 397-98.

Plaintiffs have not demonstrated that their lawsuit was a necessary and important factor in changing the twenty-five percent rule. Plaintiffs offer an affidavit from a member of the Kentucky General Assembly stating that Plaintiffs' counsel advised her on amending Ky.Rev.Stat. § 156.070. However, Plaintiffs did not enter this affidavit into the record and it is not properly before this Court. *See USA Petroleum Co. v. Atlantic Richfield,* 13 F.3d 1276, 1284 (9th Cir.1994).

In short, Plaintiffs have not shown that they are prevailing parties because they did not obtain an enforceable judgment, an injunction, a declaratory judgment, or a consent decree altering the legal relationship between them and Defendants. Further, based on the record, Plaintiffs have not demonstrated that their lawsuit was an important and necessary factor in changing the law.

III. CONCLUSION

Accordingly, the judgment of the district court is AFFIRMED.

NATHANIEL R. JONES, Circuit Judge, dissenting.

The majority finds it unnecessary to remand this case despite the magistrate court's clear error in applying this Court's holding in Horner I. The majority also suggests in dicta that we use a discriminatory animus standard, rather than a deliberate indifference standard, in assessing the deprivation of educational opportunities to Kentucky's female high school softball players. In my view, Supreme Court precedent clearly dictates that we use a deliberate indifference standard in assessing Plaintiffs' claim. I also believe that Plaintiffs should be afforded the opportunity to meet this deliberate indifference standard below – an opportunity of which they were deprived by the magistrate court's misreading of this Court's decision in Horner I. Accordingly, I respectfully dissent.

I.

We have already delineated the contours of this lawsuit in a previous decision. Although defendant Kentucky High School Athletic Association ("Association") sanctions boys' baseball, it did not recognize "fast-pitch" softball – the practical equivalent of baseball for female athletes – prior to the filing of this lawsuit. *See Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 269 (6th Cir.1994). The essence of Plaintiffs' complaint was that because of Defendants' failure to recognize fast-pitch competition in Kentucky high schools, Kentucky's female high school softball players were at a disadvantage in competing for the collegiate benefits and opportunities enjoyed by Kentucky's male high school baseball players. For example, a significant number of colleges offer financial assistance in the form of athletic

scholarships for softball players. *See id.* Moreover, it seems a given that many college coaches can improve an applicant's standing with the college's admissions department by designating the applicant as a "recruit." Plaintiffs theorized that college softball coaches were reluctant to allocate valuable scholarship monies, or otherwise devote recruiting efforts to Kentucky high school softball prospects, because Kentucky's softball players were untested and unproven in the fast-pitch game. Kentucky's high school baseball players, of course, faced no such impediments.

Recently, a district court observed in a similar case that "[f]or too long, the girls' softball team has been denied athletic opportunity equal to the boys' baseball team." *Daniels v. Schooi Bd. of Brevard Co., Fla.*, 985 F.Supp. 1458, 1462 (M.D.Fla.1997). The primary issue in this appeal is whether the district court correctly concluded that Plaintiffs produced no evidence of "intentional discrimination" as a predicate for an award of compensatory damages. An answer to this question will depend entirely on the definition of "intentional discrimination" under Title IX. Plaintiffs urge us to apply a "knowledge" or a "deliberate indifference" standard for "intentional" violations of Title IX. Plaintiffs contend that so long as Defendants were aware of the discriminatory effect of their failure to sanction fast-pitch softball, but nevertheless failed to modify their bylaws to comply with Title IX's mandates, then they "intentionally" violated Title IX. Defendants counter that "intentional discrimination" under Title IX requires a finding of "discriminatory animus" against Plaintiffs' gender.

The majority suggests in dicta that Defendants are likely correct in their choice of standard, but holds that

Plaintiffs lose as a matter of law in either case. I disagree with both conclusions. First, the Supreme Court has determined that a "deliberate indifference" standard governs whether Title IX is intentionally violated. *See Davis v. Monroe Co. Bd. of Ed.*, 526 U.S. 629, 119 S.Ct. 1661, 1675, 143 L.Ed.2d 839 (1999). Further, because the magistrate court clearly misread the holding of Horner I, and because I believe the majority essentially rewrites that decision through its reasoning in this case, the majority has, in my judgment, wrongly concluded that Defendants are entitled to summary judgment on monetary damages. To the contrary, Plaintiffs must be afforded an opportunity to meet the Davis standard below.

II.

The starting point for our analysis should be the seminal decision of *Bell v. Hood,* 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946) in which the Supreme Court stated the oft-repeated principle that where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. *Id.* at 684, 66 S.Ct. 773 (footnotes omitted); see also *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 70-71, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992) ("[A]bsent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute"); *Justice v. Pendleton Place Apartments*, 40 F.3d 139, 143 (6th

Cir.1994) (stating that the burden is on the defendant to demonstrate that Congress did not intend requested relief).

The majority opinion is replete with references to Title IX, but nowhere does it examine closely the statute's provisions. I submit that to engage in a proper analysis, we must look to the Act itself. The pertinent language of Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" 20 U.S.C. § 1681(a). When Title IX was enacted in 1972, it was patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, which banned racial discrimination in federally funded programs. *See Cannon v. University of Chicago*, 441 U.S. 677, 696, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) ("The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years."). The Supreme Court has observed that the primary purposes of Title IX were (1) "to avoid the use of federal resources to support discriminatory practices;" and (2) "to provide individual citizens effective protection against these practices." *Gebser v Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 118 S.Ct. 1989, 1997, 141 L.Ed.2d 277 (1998); *see also Haffer v. Temple Univ.*, 524 F.Supp. 531, 533 (E.D.Pa.1981) (Title IX was intended to provide "the essential guarantees of equal opportunity in education for men and women") (quoting 118 Cong. Rec. 5808 (1972) (remarks of Sen. Birch Bayh)). There is also no doubt that Congress fully intended Title IX to mandate gender equity in scholastic athletic programs. *See id.* at 534-36 (recounting legislative history and subsequent defeat of various measures that would have limited Title IX's

impact on athletic programs); *see also* 34 C.F.R. § 106.41(c) (recipients of federal funds must generally provide equality of athletic opportunity to students of both sexes); *Yellow Springs Bd. of Ed. v. Ohio High School Athletic Ass'n*, 647 F.2d 651, 660-61 (6th Cir.1981) (Jones, J., concurring in part and dissenting in part). Finally, the Supreme Court has recognized that Title IX was enacted pursuant to Congress's spending power. *See Davis*, 119 S.Ct. at 1669-70; *Franklin*, 503 U.S. at 74, 112 S.Ct. 1028. By agreeing to accept federal funds, Defendants essentially contracted with the federal government that they would not discriminate on the basis of gender in athletics. *See Gebser*, 118 S.Ct. at 1997.

An implied cause of action exists under Title IX. *See Davis*, 119 S.Ct. at 1669; Gebser, 118 S.Ct. at 1996; *Cannon*, 441 U.S. at 717, 99 S.Ct. 1946. As noted *supra*, courts are generally free to "make good on the wrong done" when federal rights have been infringed, subject to only two constraints. Courts are limited in granting relief when (1) Congressional intent is to the contrary, or (2) the purposes of carrying out the statute would be frustrated. *See Gebser*, 118 S.Ct. at 1996. It is well-accepted that Congress did not intend to limit the available remedies in Title IX cases. *See Franklin*, 503 U.S. at 72, 112 S.Ct. 1028. Indeed, in 1986, Congress even abrogated the states' Eleventh Amendment immunity in Title IX cases. *See id.* Thus, the remaining question is whether an award of damages to Plaintiffs in this case would frustrate the purposes of Title IX.

In dicta, the majority appears to agree with Defendants' argument that the "discriminatory animus" standard is appropriate here. The Supreme Court has defined a discriminatory animus towards women as having "a purpose

that focuses upon women by reason of their sex . . . directed specifically at women as a class." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269-70, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993). I believe that, short of a defendant actually defying a court injunction, the "animus" standard will almost never be met in a Title IX athletic-equity case. *Cf. Guardians Ass'n v. Civil Serv. Comm'n of New York City*, 463 U.S. 582, 632, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983) (Marshall, J., dissenting).

The excuses for not maintaining gender equity in scholastic athletic programs are all too familiar. School administrators usually justify differences in athletic opportunities between the sexes because of a misperceived lack of interest or ability among female athletes, or because of a belief that altering the status quo in athletic programs is not worth the inconvenience or expense. *See generally Cook v. Colgate Univ.*, 802 F.Supp. 737, 746-50 (N.D.N.Y.1992) (addressing various defenses for college's failure to grant varsity status to women's hockey team), *vacated as moot*, 992 F.2d 17 (2d Cir.1993); *Daniels v. School Bd. of Brevard Co., Fla.*, 995 F.Supp. 1394, 1395 (M.D.Fla.1997) (school board argued that it was too expensive to remedy existing inequities between softball and baseball programs); *Pederson v. Louisiana State Univ.*, 912 F.Supp. 892, 918 (M.D.La.1996) (Title IX violations were "result of arrogant ignorance, confusion regarding the practical requirements of the law, and a remarkably outdated view of women and athletics which created the by-product of resistance to change").

Yet, purported "unintentional" violations of Title IX are pervasive in our educational institutions even a quarter-century after the statute's enactment. While much has

changed for female athletes since the passage of Title IX, much remains the same. According to the Department of Education, in 1997,

> [a]t the high school level, there are still about 24,000 more boys' varsity teams than girls' teams; in college, women receive only one-third of all athletic scholarships; and, between 1992 and 1997, overall operating expenditures for women's college sports programs grew only 89 percent, compared to 139 percent for men, representing only 23 percent of the total operating expenses.

United States Department of Education, Title IX: 25 Years of Progress, Part 6 (1997). Another study conducted on Title IX's Silver Anniversary concluded that while there had been "significant gains" in athletic opportunities for female college students,

> these gains still leave girls and women without their fair share of opportunities to compete. Only 9 percent of Division I colleges provide athletic opportunities for women within 5 percentage points of women's share of enrollment. Even among Division I schools that do not sponsor football, only 16 percent even come close to providing women with athletic opportunities in proportion to women's enrollment in the student body.

National Women's Law Center, Title IX at 25: Report Card on Gender Equity (1997). This study gave educational

institutions an overall grade of "C" for Title IX compliance in athletic programs. *Id.*

Despite these recent statistics, I am not aware of any Title IX athletic-equality case in which the plaintiff could have met the overdemanding "animus" standard of intentional discrimination. As explained above, gender inequities in athletic opportunities are more often-if not always the result of misperceptions, ignorance, or an unwillingness to alter the status quo rather than a conscious decision to treat women differently because they are women. Because the "animus" standard ensures that Title IX defendants will be virtually impervious to a money judgment, they have little incentive to rectify any inequities in their athletic programs until judicially directed. Instead, the "animus" standard allows defendants to remain blissfully ignorant of their Title IX obligations with little fear of having to pay damages for depriving their students of equal athletic opportunities. For this reason, I believe the standard is antithetical to the remedial purposes of Title IX, frustrating, rather than promoting, the Act's central goals *See Gebser*, 118 S.Ct. at 2005 (Stevens, J., dissenting).

III.

Moreover, I believe the standard itself rests on flimsy legal ground. The sole source for the "discriminatory animus" standard is Justice White's plurality opinion in *Guardians*, 463 U.S. at 584-607, 103 S.Ct. 3221 (White, J.). In *Guardians*, a class of minority civil employees in New York City brought an action under Title VI of the Civil Rights Act of 1964, contending that the city' "last hired, first fired" policy had a disparate effect on minority workers.

The issue in *Guardians* was "whether proof of discriminatory intent [was] required to establish a violation of Title VI[.]" *Id.* at 615, 103 S.Ct. 3221 (Marshall, J., dissenting). Seven opinions were filed in the *Guardians* case, in which a consensus emerged twice. First, a majority of the Court agreed that injunctive and declaratory relief were available for so-called "unintentional" violations of Title VI. Second, a different majority of the Court rejected the workers' argument that monetary damages were recoverable in cases of unintentional discrimination.[1] Of the seven

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[1] Justice White summarized the various votes as follows:

> Despite the numerous opinions, the views of at least five Justices on two issues are identifiable. The dissenters, JUSTICES BRENNAN, MARSHALL, BLACKMUN, and STEVENS, join with me to form a majority for upholding the validity of the regulations incorporating a disparate-impact standard. *See* n. 2, *supra*. A different majority, however, would not allow compensatory relief in the absence of proof of discriminatory intent. JUSTICE REHNQUIST and I reach this conclusion directly. *See* Parts III and IV, *supra*; post, at 612, 103 S.Ct. 3221 (REHNQUIST, J., concurring in judgment). JUSTICE POWELL, joined by THE CHIEF JUSTICE, post, at 608-610, 103 S.Ct. 3221, believes that no private relief should ever be granted under Title VI under any circumstances. JUSTICE O'CONNOR, post, at 615, 103 S.Ct. 3221, would hold that all relief should be denied unless discriminatory intent is proved. It follows

opinions filed in that case, only Justice White's opinion suggested a standard for "intentional discrimination." *See id.* at 584, 103 S.Ct. 3221 ("I conclude that . . . in the absence of proof of discriminatory animus, compensatory relief should not be awarded to private Title VI plaintiffs") (White, J.); *id.* at 607 n. 27, 103 S.Ct. 3221 (same). Only one other justice joined Justice White on this issue. *See id.* at 612, 103 S.Ct. 3221 (Rehnquist, J., concurring in the judgment). Indeed, this Court has already declined to take an expansive reading of Justice White's opinion in *Guardians* for the very reason that it did not command a majority of the Court. *See Neighborhood Action Coalition v. Canton, Ohio*, 882 F.2d 1012, 1015 (6th Cir.1989); *see also Bartlett v. New York State Bd. of Law Exam'rs*, 970 F.Supp. 1094, 1148-49 (S D.N.Y.1997), *aff'd. in relevant part*, 156 F.3d 321 (2d Cir.1998), vacated on other grounds, --- U.S. ----, 119 S.Ct. 2388, 144 L.Ed.2d 790 (1999);[2] *Moreno v. Texas Southern Univ.*, 573 F.Supp. 73, 77 (S.D.Tex.1983) (recognizing that

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> from the views of these three latter Justices that no compensatory relief should be awarded if discriminatory animus is not shown.

Id. 463 U.S. at 607 n. 27, 103 S.Ct. 3221 (White, J.).

[2] Bartlett was vacated in light of the Supreme Court's recent decisions limiting the scope of "disability" under the ADA. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 119 S.Ct. 2133, 144 L.Ed.2d 484 (1999); *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555, 119 S.Ct. 2162, 144 L.Ed.2d 518 (1999). Nevertheless, I still find Bartlett's discussion of damages to be a correct statement of the law.

Justice White's opinion on damages was not the opinion of the Court); *Tyler v. City of Manhattan*, 118 F.3d 1400, 1414 (10th Cir.1997) (Jenkins, J., dissenting).

My position that Justice White's opinion must be kept within its proper bounds is further supported by subsequent Supreme Court decisions. A unanimous Court explained the Guardians holding in an opinion issued the following term: "A majority of the [*Guardians*] Court agreed that retroactive relief is available to private plaintiffs for all discrimination, whether intentional or unintentional, that is actionable under Title VI." *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 n. 9, 104 S.Ct. 1248, 79 L.Ed.2d 568 (1984). It seems to me that if the *Guardians* Court did indeed limit compensatory relief to cases of intentional discrimination involving discriminatory animus, such a limitation would have been acknowledged in *Consolidated Rail Corporation's* explanation of *Guardians*. *See Bartlett*, 970 F.Supp. at 1148-49. Additionally, another unanimous Court explicitly limited *Guardians* to situations involving "factors peculiar to Title VI" when it refused to read an intent requirement in § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, which was another Spending Clause antidiscrimination statute. *See Alexander v. Choate*, 469 U.S. 287, 294-95 n. 11, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985).[3]

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[3] Incidentally, courts have been very hesitant to hold § 504 plaintiffs to the "animus" standard as a requisite for compensatory relief. *See, e.g., Bartlett*, 156 F.3d at 330-31; *Greater Los Angeles Council on Deafness v. Zolin*, 812 F.2d 1103, 1106-09 (9th Cir.1987) (allowing action for monetary relief for discriminatory refusal to provide interpreters to deaf plaintiffs); *Miener v. State of Missouri*, 673 F.2d 969, 978-79 (8th Cir.1982)

Finally, and most significantly, the Court was recently

(compensatory relief available for § 504 plaintiff; complaint gave defendants adequate notice that they were charged with violating federal antidiscrimination mandates); *Love v. McBride*, 896 F.Supp. 808, 810 (N.D.Ind.1995) (refusing to accommodate plaintiff despite repeated requests for access amounted to intentional discrimination), *aff'd*, 103 F.3d 558 (7th Cir.1996).

In each of these cases, the federal funding recipient denied equal opportunity to the § 504 plaintiff by refusing to provide an accommodation for the plaintiff's disability. Surely there was no "animus" against the disabled plaintiff either individually or as a class in these cases. Rather, these defendants were "indifferent" to their federal obligations very much like defendants in Title IX athletic cases. Nonetheless, the statutory violations were still "intentional" because the defendants had full knowledge of their own discriminatory conduct. As the Second Circuit explained:

> [I]ntentional discrimination may be inferred when a "policymaker acted with at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result from the implementation of the [challenged] policy . . . [or] custom." *Ferguson v. City of Phoenix*, 931 F.Supp. 688, 697 (D.Ariz.1996), *aff'd and remanded* [157 F.3d 668 (9th Cir.1998)] . . . ; *see also Canton v. Harris*, 489 U.S. 378, 385, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

Bartlett, 156 F.3d at 331. The Second Circuit's understanding of "intentional discrimination" is in perfect accordance with the Supreme Court's decision in *Davis*.

presented in *Davis* with an opportunity to apply the animus standard as a requisite for monetary recovery under Title IX, but instead ruled that a "deliberate indifference" standard would support a finding of intentional discrimination. In Davis, the plaintiff brought a Title IX action after her complaints of sexual harassment by a fellow classmate were ignored by school officials. *See Davis*, 119 S.Ct. at 1666-67. The Court noted that the circuits were split for the standard of intentional discrimination in Title IX sexual harassment cases, and that one circuit had endorsed the "animus" standard for monetary recovery in Title IX cases. *See id.* at 1668-69 (citing *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir.1996) (allowing recovery only upon showing that school responded to harassment claims differently on the basis of gender)). Rejecting *Rowinsky* and the very "animus" standard urged by Defendants, the Court held that Title IX "makes clear that . . . students must not be denied access to educational benefits and opportunities on the basis of gender," and that such a denial of benefits is to be measured from a "deliberate indifference" and/or an "actual knowledge" standard. *Id.* 119 S.Ct. at 1675.

In my view, Davis makes abundantly clear that the crucial factor determining whether a defendant has intentionally violated Title IX is notice. Besides, Davis was hardly a revolutionary opinion. Rather, the decision marks the third time that the Court has articulated a "deliberate indifference" standard for Title IX liability in this decade. Both *Gebser* and *Franklin* involved a Title IX lawsuit filed against a school district after a teacher had sexually abused the student-plaintiff. In *Franklin*, the Court authorized compensatory damages under Title IX for the first time, reasoning that "[t]he point of not permitting monetary

damages for an unintentional violation is that the receiving entity lacks notice that it will be liable for a monetary award. The notice problem does not arise in a case such as this, in which intentional discrimination is alleged." *Franklin*, 503 U.S. at 74-75, 112 S.Ct. 1028. The Court ruled that the defendant-school district had "intentionally" violated Title IX because school officials were "aware of and investigated [the teacher's] sexual harassment of *Franklin* and other female students [but] took no action to halt it and discouraged Franklin from pressing charges against [the teacher]." *Id.* at 64-65, 112 S.Ct. 1028. Conversely, in a similar situation six years later, the Court held that the defendant had not intentionally violated Title IX because it had no notice of the sexual harassment. *See Gebser*, 118 S.Ct. at 1999-2000 (noting that plaintiffs admitted that they could not prevail under an "actual notice" standard).

The majority suggests that the meaning of *Gebser* and *Davis* is unclear because they "are not readily analogous to the present situation." *Ante* at 692. On the other hand, the majority concludes, *Guardians* is this case's "equivalent." *Id.* Given that *Davis* holds that Title IX's regulations put federal funding recipients on notice of their contractual duties, and given that the regulations state that Title IX is violated when a school's athletic policies are discriminatory in effect, the majority's distinguishing of *Davis* is without significance. Furthermore, I can discern no practical difference between Defendants' "neutral policy" and a university's failure affirmatively to gauge the interest for fast-pitch softball among its student body. I find it incongruent that liability under the former should be measured by an "animus" standard while the latter by a "deliberate indifference"

standard even though both violations arise under the same statute.

I also believe that such a distinction finds no support in *Davis*, as the Court again reminded us that Title IX protects students, not schools:

> Consider, for example, a case in which male students physically threaten their female peers every day, successfully preventing the female students from using a particular school resource-an athletic field or a computer lab, for instance. District administrators are well aware of the daily ritual, yet they deliberately ignore requests for aid from the female students wishing to use the resource. The district's knowing refusal to take any action in response to such behavior would fly in the face of Title IX's core principles, and such deliberate indifference may appropriately be subject to claims for monetary damages.

Davis, 119 S.Ct. at 1675. I fail to see why the above rule does not apply to Defendants in this case. If a Title IX defendant intentionally deprives a student of educational opportunities when it fails to curb harassment caused by third parties, then surely a defendant likewise intentionally deprives students of those opportunities when it fails to rectify athletic inequities caused by a "neutral policy." In each situation, the student is being denied the use of school resources on the basis of her gender-precisely the evil Title IX was designed to prevent. And in each situation, the defendant is "well aware"

of the deprivation of opportunities. It follows that in each situation, monetary relief should be available.

IV.

Finally, I disagree with the majority's decision to overlook the district court and magistrate court's error below, an error which I believe deprived Plaintiffs of the opportunity to satisfy the deliberate indifference standard. Our reviewing responsibility is to correct error, not rationalize it.

The majority concedes that the magistrate court was "technically incorrect" in holding that the Horner I opinion established that there was no intentional discrimination for Title IX purposes as a matter of law. *Ante* at 694. As the majority acknowledges, the original panel held "that there were genuine issues of fact regarding a Title IX violation." *Id*. Yet the magistrate court improperly applied the Horner I panel's summary judgment on the equal protection claim to the Title IX claim, concluding, as a matter of law, that there was no intentional discrimination under Title IX. J.A. at 340. It further stated that Plaintiffs had not offered additional evidence regarding intentional discrimination since the remand, and thus declared Plaintiffs' claim for monetary damages "not viable." J.A. at 340. Despite this clear misreading of Horner I, rather than remanding for the district court to assess whether Defendants were deliberately indifferent to Plaintiffs' Title IX rights, the majority still finds for Defendants.

I find this result unacceptable. First, I think the majority's discussion improperly revisits and re-decides the dispute already resolved by Horner I. Over a dissent, the

Horner I majority concluded that "genuine issues of material fact abound in this case, and preclude any determination that Defendants have complied with Title IX's equal opportunity mandate." 43 F.3d at 275. On this basis, it reversed the district court's entry of summary judgment for Defendants. Nevertheless, the majority now states that Horner I "did not hold that Plaintiffs made out a prima facie case of a Title IX violation," *Ante* at 696, and proceeds to grant summary judgment. I believe that rather than giving Horner I its proper effect, this reading simply echoes the dissent in Horner I, which also reasoned that because Plaintiffs "did not present a prima facie case of a Title IX violation," summary judgment should have been granted on the Title IX claim. 43 F.3d at 276 (Batchelder, J., dissenting in part). Similarly, when the current majority now concludes that summary judgment is warranted because Plaintiffs have "failed to offer any additional evidence" that Title IX had been violated, it again runs roughshod over the Horner I conclusion that there was a sufficient dispute in the record to withstand summary judgment. Yet again, the majority's conclusion more closely adheres to the Horner I dissent, which found the record "silent or otherwise inadequate" on the issues "upon which the plaintiffs' case depends," and which castigated the Plaintiffs' statistics showing a disparity between boys' and girls' participation in Kentucky high school sports. 43 F.3d at 277 (Batchelder, J., dissenting in part). In sum, I do not believe this Court should stamp its approval on the district court's clear mishandling of the Horner I remand, let alone rewrite the conclusion of Horner I's majority in the voice of its dissent.

Second, contrary to the majority, I believe it is certainly possible that the standards of notice and deliberate

indifference could be met in this case. Defendants were, after all, the sole entities that could sanction interscholastic sports in Kentucky, and implemented slow pitch softball in 1982. Nor can Defendants argue that they would be unfairly "surprised" by imposition of a monetary award, as were the defendants in *Guardians*. Three years before Defendants sanctioned slow-pitch softball, the Department of Health, Education and Welfare issued its Policy Interpretation of Title IX. *See* Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed.Reg. 71,413 (Dec. 11, 1979).[4] The Policy Interpretation explicitly states that a finding of compliance or noncompliance with Title IX would be based in part on whether the federal funding recipient's athletic programs "are discriminatory in language or effect[.]" *Id.* at 71,417, 71,418; *see also* 34 C.F.R. § 106.41(c)(1) ("[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes" is to be considered for Title IX compliance). These regulations provided clear notice to defendants of their Title IX obligations. *See Davis*, 119 S.Ct. at 1671, 1673 (Title IX regulations inform federal funding recipients of their contractual duties).[5] Providing an environment free from

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[4] The Policy Interpretation has been cited with approval by several courts, including this one. *See Horner*, 43 F.3d at 273-74; *Cohen v. Brown Univ.*, 101 F.3d 155, 166 (1st Cir.1996).

[5] Although similar reasoning with respect to Title VI's regulations failed to garner a majority view in *Guardians, see* 463 U.S. at 628- 32, 103 S.Ct. 3221 (Marshall, J., dissenting), there is every reason now, in the fullness of subsequent developments, to accord much more force to Justice Marshall's convincing

discriminatory effect is a requirement of Title IX. Because Defendants are charged with knowledge of the law, but did not recognize fast-pitch softball until 1994, it follows that remand is appropriate to determine whether Defendants were deliberately indifferent to Plaintiffs' Title IX rights.

For the foregoing reasons, I would reverse the district court's dismissal of Plaintiffs' claims of monetary relief and remand for a determination of whether Defendants were deliberately indifferent to Plaintiffs' Title IX rights in accordance with *Davis*. I would also reserve judgment as to

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arguments with regard to Title IX. Another reason why the Alexander Court limited *Guardians* to Title VI cases was because, by the time § 504 was enacted, Title VI had been in force for nearly a decade. *See Alexander*, 469 U.S. at 294-95 n. 11, 105 S.Ct. 712. Title VI's enforcement regulations had incorporated a disparate impact standard, and nearly 40 federal agencies had adopted standards in which Title VI was interpreted to bar programs with a discriminatory impact. *See Guardians*, 463 U.S. at 629-30, 103 S.Ct. 3221 (Marshall, J., dissenting). In Alexander, the Court theorized that because Congress was well-aware of Title VI regulations prohibiting a discriminatory effect, but took no steps to restrict the remedies available under § 504 (which was based on Title VI), then Congress implicitly rejected an "intentional" standard for § 504 violations. *Alexander*, 469 U.S. at 294-95 n. 11, 105 S.Ct. 712. Because Title IX was enacted only one year before § 504, it seems safe to suggest that the same implicit assumption applies to Title IX. Indeed, because *Davis* relies on the Department of Education's Title IX regulations as providing adequate notice to defendants of their Title IX obligations, *Davis* is a validation of Justice Marshall's arguments in the context of Title IX cases. *See Davis*, 119 S.Ct. at 1671.

whether Plaintiffs were "prevailing parties" for attorney fees purposes until after the remand.

V.

Because I believe that the basis for the majority's affirmance is contrary to the remedial purposes of Title IX, I dissent.

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APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

[Filed September 9, 1997]

No. 3:92CV-295-J

LORIE-ANN HORNER, ET AL., *Plaintiffs*,	)
v.	)
KENTUCKY HIGH SCHOOL ATHLETIC ASSN., ET AL. *Defendants*,	)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

INTRODUCTION

This matter is pending before the Court on two motions. Plaintiffs have filed a motion to alter or amend a judgment entered on January 15, 1997, (Docket No. 82), and seek an award of attorney's fees. (Docket No. 81). The motions have been referred to the Magistrate Judge for findings of fact, conclusions of law, and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). (Docket No. 87),

Upon consideration, the Magistrate Judge recommends that both motions be denied.

FINDINGS OF FACT

1) At the time this lawsuit was filed, the only form of softball generally available to high school girls in Kentucky was slow-pitch softball. Plaintiffs brought this action alleging that the decision not to offer girls fast-pitch softball in Kentucky high schools violated Title XI. During the pendency of this action, the Kentucky General Assembly amended KRS 156.070 to mandate the inclusion of fast-pitch softball by any school that offers a girls' softball program. Now, the overwhelming majority of Kentucky schools offer fast-pitch softball for their female athletes. During oral arguments before the Magistrate Judge, plaintiffs' counsel stated that he was responsible for drafting the amended version of KR5 156.070 and was instrumental in seeing that it was adopted by the General Assembly.

2) Plaintiffs seek an award of attorney's fees pursuant to 42 U.S.C, § 1988. No evidence has been offered that the present lawsuit played a role in the decision of the General Assembly to amend KRS 156.070. The fact that plaintiffs' counsel played an active role in legislative drafting is the only apparent connection between this lawsuit and the statutory amendment.

CONCLUSIONS OF LAW

I. Motion to Alter or Amend the Judgment

1) Rule 59(e), F.R.Civ.P., allows a party to move to alter or amend a judgment within ten days of its entry. The rule does not specify grounds that would warrant altering or amending the judgment. Courts have generally held that there are a limited number of bases for this motion. The motion is appropriate if there has been an intervening change in the controlling law, if new evidence not previously available comes to light, or if there is a need to correct a clear error of law or fact or prevent manifest injustice. *See, e.g.* Matter of Prince, 85 F.3d 314 (7th Cir. 1996); Javetz v Board of Control Grand Valley State University, 903 F.Supp. 1181 (W.D.Mich. 1995); Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2810.1.

2) In the present case, there has been no change in controlling law since the entry of the judgment and plaintiff's have not identified any evidence which was not previously available or considered by the Court. Plaintiffs argue that the Court made an error of law. This point of law concerns the meaning and interpretation of a Sixth Circuit decision rendered in this case. At issue is whether the Sixth Circuit held that there was no "intentional discrimination." This issue was argued by the parties at oral arguments, in their briefs, and on objections to the Magistrate Judge's recommendation. Plaintiff now attempts to reargue a position twice rejected. A motion for reconsideration is not the proper vehicle for revisiting issues that have already been decided by the court or merely to relitigate issues previously considered.

See. e.g. Bermingham v. Sony Corp of America, 820 F.Supp. 834 (D.N.J. 1992), *aff'd*, 37 F.3d 1485 (3d Cir. 1994); DeMasse v. ITT Corp., 915 F. Supp. 1040 (D.Ariz. 1995); U.S. v. York, 890 F. Supp. 1117 (D.D.C. 1995).

II. Motion for Attorney's Fees

3) Plaintiffs seek an award of attorney's fees pursuant to 42 U.S.C. § 1988. Under that statute, "the court, in its discretion, may allow the prevailing party. . . a reasonable attorney's fees as part of the costs." § 1988(b). Plaintiffs make three, arguments in support of their request for fees: a) they are the "prevailing party," b) defendants acknowledged in a prior pleading that the rules governing girls' softball were changed as a result of this lawsuit; and, c) the Sixth Circuit recognized that there were "abundant" Title IX violations. Defendants contest all three bases for awarding fees

Prevailing Party

4) In Farrar v. Hobby, 113 S.Ct. 566 (1992), the Supreme Court discussed what constitutes a "prevailing party" for purposes of an award of attorney's fees under § 1988.

> Congress intended to permit the . . . award of counsel fees only when a party has prevailed on the merits . . . Under our 'generous formulation' of the term, plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in

> bringing the suit . . . Therefore, to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought or comparable relief through a consent decree or settlement. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement . . . . In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parries by modifying the defendant's behavior in a way that directly benefits the plaintiff.

Id. at 572-73 (citations omitted).

5) It is undisputed that plaintiffs obtained no relief on the merits of their claims in this lawsuit. What relief they received came from the Kentucky General Assembly. There has been no judicial determination that any of plaintiffs' claims are meritorious. Neither has there been any settlement of those claims or consent decree entered.

Availability of Fees Under the Catalyst Theory

6) Even without prevailing in the lawsuit, fees are still available if the lawsuit served es the catalyst for obtaining the results desired by plaintiffs. Under the catalyst theory, fees are available by establishing a clear, causal relationship between the litigation brought and the practical outcome realized. Robinson v. Ariyoshi, 933 F.2d 781 (9th Cir.

1991). It is necessary that the lawsuit be, if not the sole reason for success, at least a major factor in bringing it about. Coen v. Harrison County School Bd., 638 F.2d 24 (5th Cir. 1981), *cert. den.*, 455 U.S. 938; Kansas Health Care Ass'n Inc. v. Kansas Dept. Of Social and Rehabilitation Services, 31 F.3d 1052 (10th Cir. 1994).

7) In the present case, plaintiffs contend that defendants acknowledged in their motion for summary judgment, without quoting or pointing to any specific statement, that they changed their pólicies in order to render the present lawsuit moot. Defendants deny this. The Magistrate Judge has reviewed defendants' motions for summary judgment, (Docket No. 39 and 71), and can find nothing that states or implies that the decision to change their policies regarding girls' softball was influenced to any degree by the present lawsuit. In the absence of any acknowledgment by the defendants, it is up to the plaintiffs to provide proof of causation and they have provided none. In sum, there is nothing in the record to show that this lawsuit was a factor, much less a major or significant factor, in bringing about the statutory change in the General Assembly that resulted in the sanctioning of girls' fast-pitch softball.

"Abundant" Title IX Violations

8) Finally, plaintiffs contend that the Sixth Circuit recognized that there were "abundant" Title IX violations. Again, plaintiffs do not identify any particular portion of the Sixth Circuit opinion in supports of this contention. The Magistrate Judge has reviewed the Sixth Circuit opinion, Homer v Kentucky High School Athletic Ass'n., 43 F.3d 265 (6th Cir. 1994), and can find no statement that "abundant"

Title IX violations, are present. The Sixth Circuit concluded its review of the Title IX claims by stating that "[i]t is evident that genuine issues of material fact abound in this case, and preclude any determination that defendants have compiled with Title IX's equal athletic opportunity mandate." Id. at 275. Genuine issues of fact do not equate with abundant legal violations.

RECOMMENDATION

The Magistrate Judge, having made findings of fact and conclusions of law, recommends that plaintiffs' motion to alter, amend or vacate the judgment be denied and the motion for attorney's fees be denied.

Date: _____ /s/_____
JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to: Counsel of Record

APPENDIX C

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

[Filed March 10, 1995]

No. 93-5191

Lorie Ann HORNER; Jennifer Baker; Juliane Brown; Leslie Burgett; Angela Chaffin; Tracy Dotson; Jacqueline Elston; Amy Hacker; Elizabeth Suzanne Hartlage; Kelly Johnson; Barrie Wagers; and Mary Christine Whitelock, by and through their next friends,

Plaintiffs-Appellants,

v.

KENTUCKY HIGH SCHOOL ATHLETIC ASSOCIATION and Kentucky State Board for Elementary and Secondary Education,

Defendants-Appellees.

Argued March 14, 1994.
Decided Dec. 22, 1994.

Court of Appeals Opinion - 3/10/95

Rehearing and Suggestion for Rehearing En Banc
Denied March 10, 1995.

Before: KEITH and BATCHELDER, Circuit Judges; and JOINER, District Judge.*

JOINER, District Judge, delivered the opinion of the court, in which KEITH, District Judge, joined. BATCHELDER, Circuit Judge (pp. 276-77), delivered a separate opinion dissenting in part.

JOINER, District Judge.

Plaintiffs are twelve female student athletes who participate in interscholastic girls' high school slow-pitch softball in Kentucky. Plaintiffs contend that defendants, the Kentucky State Board of Education for Elementary and Secondary Education and the Kentucky High School Athletic Association, discriminated against them on the basis of sex by sanctioning fewer sports for girls than for boys and by refusing to sanction girls' interscholastic fast- pitch softball. Plaintiffs' complaint asserted claims under the Equal Protection Clause; Title IX of the Education Amendments of 1972, as amended by the Civil Rights Restoration Act of 1987 (20 U.S.C. §§ 1681-1688); and state law. The district court concluded that plaintiffs were not denied equal athletic opportunity, and granted summary judgment for defendants on plaintiffs' constitutional and Title IX claims. We conclude that genuine issues of material fact preclude the entry of

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* The Honorable Charles W. Joiner, United States District Court for the Eastern District of Michigan, sitting by designation.

summary judgment on the Title IX claim, but affirm the entry of summary judgment on plaintiffs' equal protection claim.

I.

We review the entry of summary judgment de novo, assessing the record in the light most favorable to plaintiffs, and drawing all reasonable inferences in their favor. *Klepper v. First Am. Bank,* 916 F.2d 337, 341 (6th Cir.1990).

A.
Defendants

The primary function of the Kentucky State Board for Elementary and Secondary Education is to "develop and adopt policies and administrative regulations by which the Department of Education shall be governed in planning, coordinating, administering, supervising, operating, and evaluating the educational programs, services and activities within the Department of Education which are within the jurisdiction of the board." Ky.Stat.Ann. § 156.029(7) (Baldwin 1990). The Board has the exclusive management and control of all the common schools in Kentucky and all of the programs operated in the schools, including interscholastic athletics. § 156.070(1). Pursuant to statute, the Board is allowed to delegate its responsibility to manage and control interscholastic athletic programs to an agent. § 156.070(2).

The Kentucky High School Athletic Association (KHSAA) is designated by regulation as the Board's "agent to manage interscholastic athletics at the high school level in the common schools, including any private schools desiring to associate with KHSAA and to compete with the common

schools." 702 Ky.Admin.Regs. § 7:065(1) (1993). The KHSAA is a voluntary, self-managing, unincorporated association of public, private and parochial schools. The member schools pay dues, and are required to comply with the KHSAA's constitution, by-laws, policies, and procedures. The KHSAA's board of control consists of twelve persons elected to four-year terms by representatives of the member schools.

Sanctioning of a Sport

A number of interscholastic sports are "sanctioned" by the KHSAA, meaning that the KHSAA will recognize and sponsor a state tournament in the sport. Pursuant to the decision of the board of control, a new sport will not be sanctioned unless at least 25 percent of the member schools indicate a willingness to participate. A sport must have 15 percent participation to continue its sanctioned status. The KHSAA states that this policy is due to limited resources; the association is not able to sponsor a state tournament in all sports in which there is some student interest. The KHSAA does not explain why 25 percent interest is necessary to sanction a new sport if only 15 percent participation is sufficient to maintain a sanctioned sport.

The KHSAA does not prohibit member schools from participating or competing in non-sanctioned sports. Additionally, the association does not prohibit girls from playing on boys' teams in sanctioned sports if the member school does not provide a girls' team. The record does not indicate whether the lack of these affirmative prohibitions has translated into a real opportunity for girls; *i.e.*, whether girls desiring to compete outside the auspices of the KHSAA

actually have been able to do so, and whether girls have a meaningful opportunity to play and compete on boys' teams.

At the time the lawsuit was filed, the KHSAA sanctioned 18 sports, 10 for boys and 8 for girls.[1] Girls' slow-pitch softball was first sanctioned in 1982, following a survey in which 44 percent of the member schools indicated they would participate. In 1988, a survey was conducted regarding girls' fast-pitch softball, and 26 schools, approximately 9 percent, indicated they would participate. A second survey was conducted in 1992, and 50 schools, approximately 17 percent, indicated they would participate. The record does not reflect whether female athletes at the member schools were polled or otherwise consulted before the schools responded, or failed to respond, to the survey. The KHSAA refused to sanction the sport because 25 percent of the schools did not indicate a willingness to participate.

The Importance of Fast-Pitch Softball

The KHSAA sanctions boys' baseball, but not what plaintiffs claim is the practical equivalent for girls, fast-pitch softball. In all sports sanctioned by the KHSAA save one, the participants are taught the skills necessary for them to have the opportunity to compete for college athletic scholarships. The exception is slow-pitch softball. Although slow-pitch softball embodies some of the same rudimentary skills of baseball, it is significantly different from fast-pitch softball in

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[1] Boys' sports were basketball, baseball, cross country, football, golf, soccer, swimming, tennis, track and wrestling. Girls' sports were basketball, cross country, golf, slow-pitch softball, swimming, tennis, track and volleyball.

its rules and regulations and in the physical and mental skills required.

Plaintiffs assert, and defendants do not dispute, that 1,133 schools in the National Collegiate Athletic Association, the National Association of Intercollegiate Athletics, and the National Junior College Athletic Association sanction fast-pitch softball. Many of the schools offer scholarship assistance to softball players. The NCAA and the NAIA do not sanction slow-pitch softball, and only 49 schools in the NJCAA play slow-pitch softball, while 215 play fast-pitch. Kentucky's female softball players are at a disadvantage when competing for college athletic scholarships.

Funding

The KHSAA is funded primarily by profits derived from football playoffs and the state basketball tournament. The KHSAA does not receive direct federal financial assistance, but does receive a portion of its revenues from dues paid by member schools. Neither defendant contests plaintiffs' assertion that most of the member schools in the KHSAA are public high schools which receive federal funds.

The Board receives funds solely from the Kentucky General Assembly. The General Assembly appropriates money to the Kentucky Department of Education, from which an allotment is made to the Board. The Board did not directly receive financial assistance from the federal government or any of its agencies at any time relevant to the suit.

The Board does not dispute that the Kentucky Department of Education receives $396 million in federal

funds for education assistance and specified programs. Pursuant to statute, the Department of Education is the sole state agency charged with developing and approving state plans required for receiving federal funds. Ky.Rev.Stat.Ann. § 156.010(11). The Board is authorized to implement the provisions of any act of Congress appropriating funds to the state, C 156.035(2), and has exercised this authority with respect to a number of federal financial assistance programs.[2]

B.

Plaintiffs filed suit in June 1992, contending that defendants violated Title IX, the Equal Protection Clause, and state law by sanctioning fewer sports for girls than for boys, thus affording unequal athletic opportunity, and by refusing to sanction fast-pitch softball, with the result that plaintiffs are disadvantaged in their ability to compete for and obtain

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[2] *E.g.*, 702 Ky.Admin.Regs. § 6:010 (federal assistance for school lunches under 42 U.S.C. §§ 1751 *et seq.* and 42 U.S.C. §§ 1771 *et seq.*); 704 Ky.Admin.Regs. § 3:292 (migrant education federal grant requirements of 42 U.S.C. §§ 2701 *et seq.* and §§ 2781-2783); 704 Ky.Admin.Regs. § 3:335 (federal funds received under Chapter 2 of Elementary and Secondary School Improvement Amendments of 1988, 20 U.S.C. §§ 2911-2976); 704 Ky.Admin.Regs. § 7:090 (Homeless Assistance Act Amendments of 1990, 42 U.S.C. § 11432, funds for homeless children education programs); 707 Ky.Admin.Regs. § 1:015 (Policies and procedures for use of Education of the Handicapped Act, Part B, funds, 20 U.S.C. §§ 1400 *et seq.*).

college scholarships.[3] Defendants filed motions to dismiss or for summary judgment based on a number of grounds, including arguments that they did not violate Title IX or the Equal Protection Clause, and that they were not "recipients" of federal funds and thus not subject to Title IX. The district court agreed that plaintiffs' Title IX and constitutional rights were not violated, and thus found it unnecessary to reach the other issues presented.

The court dismissed plaintiffs' equal protection claim, noting that the Equal Protection Clause comes into play only when a classification treats similarly situated persons in different ways, and implying that females are not treated differently because the KHSAA does not prohibit them from trying out for boys' teams and does not prohibit member schools from fielding teams in nonsanctioned sports. Relying on cases rejecting claims that student athletes have a due process right to participate in sports, the court concluded that the plaintiffs' interest in competing for college athletic scholarships did not rise to constitutional significance. Finally, the court found KHSAA's justification for its refusal to sanction fast-pitch softball, the 25 percent rule, to be gender-neutral and to reflect the schools' lack of interest in the sport.

With respect to defendants' alleged Title IX liability, the court held that there was no independent obligation to provide a team for girls simply because a team was supplied

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[3] Plaintiffs' request for class action certification was provisionally denied pending discovery, and it appears that defendants' motions to dismiss were filed and granted before this issue could be revisited.

for boys, relying on a Title IX regulation which states that when a team is supplied for one gender, "members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport[.]" 34 C.F.R.§ 106.41(b). The court stated that while the regulations instruct that recipients of federal funds must provide equal athletic opportunities, a number of factors are to be considered, including whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes. The court held that the evidence presented failed to raise a sufficient question that girls were denied equal athletic opportunity because they can compete on boys' baseball teams and in a sanctioned slow-pitch league. "Thus, the evidence shows that the current program offers females an unrestricted opportunity to compete, and a choice of competitive level based on the interests of the member schools." Having concluded that plaintiffs' federal claims lacked merit, the court exercised its discretion to dismiss the state law claims without prejudice.

II. Title IX

A. Whether Defendants are Subject to Title IX

Both defendants claim that they are not recipients of federal financial aid, and thus are not subject to Title IX. The district court found it unnecessary to reach this question, but defendants urge us to affirm the court's entry of summary judgment on this ground. We decline to do so.

Title IX prohibits sex discrimination under any education program or activity receiving federal funds. 20 U.S.C. § 1681(a). Pursuant to regulation, "recipient" is defined as:

> any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

34 C.F.R. § 106.2(h).

Prior to its amendment in 1987 by the Civil Rights Restoration Act, Title IX was construed as being program-specific, and not providing institution-wide coverage. *Grove City College v. Bell*, 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984). In response to that construction, Congress amended Title IX by adding § 1687, entitled "Interpretation of 'program or activity.'"

> For the purposes of this chapter, the term "program or activity" and "program" mean all of the operations of--
>
> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to

> which the assistance is extended, in the case of assistance to a State or local government;
> (2)(A). . . .
> (B) a local educational agency, system of vocational education, or other school system;
> . . . .
> any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization.

20 U.S.C. § 1687 (footnote omitted; citation omitted; emphasis added).

The legislative history describes the effect of the amendments, stating that the definitions of "program or activity" and "program" "make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance." S.Rep. No. 64, 100th Cong., 2d Sess. 4, reprinted in 1988 U.S.C.C.A.N. 3, 6. The amendment has been construed consistently with this intent. *Williams v. School Dist. of Bethlehem*, 998 F.2d 168, 171 n. 3 (3d Cir.1993), *cert. denied*, 510 U.S. 1043, 114 S.Ct. 689, 126 L.Ed.2d 656 (1994); *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir.1993).

If facts are proved consistent with plaintiffs' opposition to the Board's motion for summary judgment, we would have no difficulty concluding that the Board is a "recipient" of federal financial assistance and thus subject to

Title IX. The Board does not dispute that the Kentucky Department of Education receives over $396 million in federal funds. Pursuant to state statute, the Board controls and manages, on behalf of the Department, the state's schools and all programs conducted in the schools. While the federal funds may flow into and out of the Department, the Board's position at the Department's helm cannot be ignored. As noted, the Board has the statutory authority to implement the provisions of federal statutes appropriating funds to the state, and has exercised this authority with respect to a number of federal financial assistance programs. We therefore decline the Board's invitation to decide this case in accordance with form rather than substance, and hold that it was not entitled to summary judgment on the ground that it is not a recipient of federal funds.

The status of the KHSAA presents a closer question, but we conclude here as well that the association was not entitled to summary judgment on its claim that it is not a recipient of federal funds within the meaning and intent of Title IX. The most persuasive evidence of the KHSAA's status as a recipient is the fact that its functions are statutorily decreed to be those of the Board. The association is able to perform those functions because state law expressly permits the Board to designate an agent to manage interscholastic athletics. Ky.Rev.Stat.Ann. § 156.070(1), (2). This, in combination with the fact that the KHSAA receives dues from member schools which do receive federal funds,[4] indicates

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[4] These facts distinguish the KHSAA from its Ohio counterpart, as described in *Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association*, 647 F.2d 651, 653, 656 (6th Cir.1981) (indicating

that the association qualifies as an "agent" which indirectly receives federal funds as described in 34 C.F.R. § 106.2(h), and is thus subject to Title IX. *Grove City College*, 465 U.S. at 564-70, 104 S.Ct. at 1216-20 (perceived distinction between direct and indirect aid finds no support in Title IX; college indirect recipient of federal funds through educational grants given to its students).[5]

Congress has made clear its intent to extend the scope of Title IX's equal opportunity obligations to the furthest reaches of an institution's programs. We will not defeat that purpose by recognizing artificial distinctions in the structure or operation of an institution. Simply put, it appears that Kentucky's school system receives substantial federal financial assistance. The Board runs the schools, and the KHSAA, apparently funded in part through dues paid by the state's public schools, performs the Board's statutory

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OHSAA not "recipient" of federal funds).

[5] The Supreme Court distinguished *Grove City College in United States Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597, 106 S.Ct. 2705, 91 L.Ed.2d 494 (1986), and held that commercial airlines did not qualify as "recipients" of federal funds under § 504 of the Rehabilitation Act of 1979, 29 U.S.C. § 794, because they benefited from federal financial assistance granted to airports and because their operations were inextricably intertwined with those of airports. Unlike the commercial airlines in that case, the KHSAA here performs the statutory duties of a recipient of federal funds, and directly receives income in the form of dues from schools that receive federal funds. Its status thus goes beyond that of an indirect beneficiary of federal financial assistance.

functions with respect to interscholastic athletics. On these facts, both defendants would be subject to Title IX. We therefore reject defendants' arguments that they were entitled to entry of summary judgment on this issue, and remand this case for proceedings consistent with this opinion.

B. Equal Athletic Opportunity Mandate

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" 20 U.S.C. § 1681(a). We must determine whether the record supports the district court's conclusion that defendants complied with Title IX's equal athletic opportunity mandate. We are significantly aided in our analysis of this question by the thorough discussion of similar issues in recent cases from our sister circuits, all issued after the district court's decision in this case. *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004, 114 S.Ct. 580, 126 L.Ed.2d 478 (1993); *Williams v. School Dist. of Bethlehem*, 998 F.2d 168 (3d Cir.1993), *cert. denied*, 510 U.S. 1043, 114 S.Ct. 689, 126 L.Ed.2d 656 (1994); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir.1993).

After the enactment of Title IX, the Department of Health, Education and Welfare promulgated regulations implementing the statute's nondiscrimination requirements, and these regulations were replicated by the Department of Education at 34 C.F.R. § 106. As recognized by the district court, the regulations do not impose an independent requirement that an institution always sponsor separate teams

for each sport it sanctions. 34 C.F.R. § 106.41(b). However, the regulations do require that institutions provide gender-blind equality of athletic opportunity to its students. 34 C.F.R. § 106.41(c). An institution's compliance with this requirement is determined with reference to a number of factors, including "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes[.]" 34 C.F.R. § 106.41(c)(1). An institution "may violate Title IX simply by failing to accommodate effectively the interests and abilities of student athletes of both sexes." *Roberts*, 998 F.2d at 828.

In assessing whether an institution has met its effective accommodation obligations, reference must be made to the Policy Interpretation originally issued by the Department of Health, Education and Welfare in 1979. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed.Reg. 71,413 (Dec. 11, 1979). The Policy Interpretation states that its general principles will often apply to interscholastic athletic programs, and has been held to apply to such programs. *Id.* at 71,413; *Williams*, 998 F.2d at 171. The Policy Interpretation is a "considered interpretation" of the applicable regulations, and

is entitled to substantial deference by the courts.[6] *Cohen*, 991 F.2d at 896-97; *Williams*, 998 F.2d at 171.

To satisfy 34 C.F.R. § 106.41(c)(1), an institution must effectively accommodate the interests of both sexes in both the selection of the sports and the levels of competition, to the extent necessary to provide equal athletic opportunity. Policy Interpretation, Section VII.C.1., 44 Fed.Reg. at 71,417. With respect to the manner in which the interest of

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[6] In Cohen, the court held that the Policy Interpretation would be viewed as having been adopted by the Department of Education, although there was no record that the agency formally did so, because the agency adopted the very same regulation which the Policy Interpretation was issued to interpret, "sending an unmistakably clear signal of the agency's satisfaction with the Policy Interpretation." 991 F.2d at 896 n. 10.

Effect of rules or regulations of private organizations. The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives or benefits from Federal financial assistance.

This regulation and 702 Ky.Admin.Reg. § 7:065 (pursuant to which the Board adopts KHSAA's constitution, by-laws, procedures and rules), refutes the Board's claim in part C of its brief that it cannot be liable to plaintiffs because the KHSAA has "exclusive control" of high school athletics, and/or acted outside the scope of the Board's delegation of power to the association.

the students is to be determined, the Policy Interpretation instructs that the methods chosen by the institution must be nondiscriminatory and must not disadvantage members of an underrepresented sex. Policy Interpretation, Section VII.C.3., 44 Fed.Reg. at 71,417.

The district court found that plaintiffs have an unrestricted opportunity to compete based upon the interests of the member schools. However, the interests of the member schools is not necessarily identical with that of the students, a question on which the record is completely silent. At best, the record reflects that 17 percent of the member schools were interested in having fast-pitch softball sanctioned. The interest of female students at the other schools is unknown, because there is no information regarding whether the member schools polled their students before responding, or failing to respond, to the KHSAA's survey. Moreover, while reliance on the interest of the member schools in adding a sanctioned sport may appear to be gender-neutral, it is a method which has great potential for perpetuating gender-based discrimination. Under the district court's reasoning, a school system's compliance with Title IX can be measured by the personal views of the administrators of individual schools, irrespective of whether these views achieve Title IX's equal opportunity requirement.[7]

Regarding the selection of sports, the Policy Interpretation instructs:

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[7] Reliance on the KHSAA's 25 percent rule does not provide a safe harbor for the Board, as is evident from 34 C.F.R. § 106.6(c):

> b. Non-Contact Sports--Effective accommodation means that if an institution sponsors a team for members of one sex in a non-contact sport, it must do so for members of the other sex under the following circumstances:
>
> (1) The opportunities for members of the excluded sex have historically been limited;
> (2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team; and
> (3) Members of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or to compete actively on such a team if selected.

Policy Interpretation, Section VII.C.4.b., 44 Fed.Reg. at 71,418. With respect to subsection (1), there is evidence in the record that the opportunities for girls were, and are, more limited than those for boys. With respect to subsection (2), the level of interest of all high school girls in fast-pitch softball is unknown. With respect to subsection (3), the record reflects only that girls are not prohibited from playing on the boys' baseball teams. The record does not disclose whether and to what extent girls actually play. *See Williams*, 998 F.2d at 175 ("The mere opportunity to try out for a team . . . is not determinative of the question of 'previously limited' athletic opportunities under title IX. 'Athletic opportunities' means real opportunities, not illusory ones.").

Finally, with respect to assessing whether an institution effectively accommodates the interest of students in the selection of the levels of competition, the Policy Interpretation states:

> In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities.
> a. Compliance will be assessed in any one of the following ways:
> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex;
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and

> effectively accommodated by the present program.

Policy Interpretation, Section VII.C.5.a., 44 Fed.Reg. at 71,418 (emphasis added). *See also* Section VII.C.5.b. The Policy Interpretation's reading of the regulation draws its essence from the statute and stands upon a "plausible, if not inevitable, reading of Title IX," and is thus entitled to enforcement. *Cohen*, 991 F.2d at 899.

The plaintiffs bear the burden of proof on subsection (1), that of showing statistical disparity.[8] *Roberts*, 998 F.2d at 828; *Cohen*, 991 F.2d at 901. Substantial proportionality provides a safe harbor for recipients of federal funds. "Thus, a university which does not wish to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup." *Cohen*, 991 F.2d at 897-98. Accord *Roberts*, 998 F.2d at 829. If the plaintiffs prove disparity, then the institution must show that it satisfies subsection (2). If it fails here, the plaintiffs may prevail by sustaining their burden of proof under subsection (3) and demonstrating an unmet interest on the part of the underrepresented sex. *Roberts*, 998 F.2d at 830-31; *Cohen*, 991 F.2d at 901. Subsection (3) "'sets a high standard: it demands not merely some accommodation, but full and effective accommodation. If there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing

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[8] Although the record is silent on this point, the court was informed at oral argument that 33,891 boys (65 percent) participate in sanctioned sports in Kentucky, while only 18,860 girls (34.8 percent) participate.

programs, an institution necessarily fails this prong of the test.'" *Roberts*, 998 F.2d at 831-32 (quoting Cohen, 991 F.2d at 898).[9]

Thus, if female students are statistically underrepresented in athletics, their interests must be fully accommodated unless the institution in question can satisfy its burden of demonstrating a history and continuing practice of program expansion. An institution need not pour ever-increasing sums into its athletic programs in order to bring itself into compliance, but has the option of reducing opportunities for the overrepresented gender while keeping opportunities for the underrepresented gender stable. *Cohen*, 991 F.2d at 898-99 n. 15. Thus, a recipient may not simply

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[9] In assessing an institution's compliance with subsection (3), *i.e.*, that it fully and effectively accommodate the interests of the underrepresented sex, both the First and the Tenth Circuits have rejected the proposition that a recipient need only accommodate females to the extent that it accommodates males, or, stated differently, that an institution need only allocate athletic opportunities to women in accordance with the ratio of interested and able women to interested and able men. This argument reads the "full" out of "fully and effectively." *Cohen*, 991 F.2d at 899.

While the institution's burden under subsection (3) is an exacting one, an institution is not required to field a team in response to, *e.g.*, the pleas of "one talented softball player," if sufficient numbers of individuals to form teams to compete do not exist. *See Roberts*, 998 F.2d at 831 n. 10; *Cohen*, 991 F.2d at 898. In this case, it appears that 17 percent of the schools are prepared to field fast-pitch softball teams, an adequate number to maintain a sport under the existing regulations.

plead limited resources to excuse the fact that there are fewer opportunities for girls than for boys.

It is evident that genuine issues of material fact abound in this case, and preclude any determination that defendants have complied with Title IX's equal athletic opportunity mandate. We therefore reverse the district court's entry of summary judgment on plaintiffs' Title IX claims.[10]

III. Equal Protection Claim

Plaintiffs do not claim to have a constitutional right to participate in interscholastic athletics.[11] Rather, they challenge the disparate impact of the KHSAA's concededly neutral 25 percent rule, claiming that the rule disproportionately and adversely affects young women by reducing their athletic opportunities, in terms of both the number and kind of sports sanctioned by the KHSAA.

The Equal Protection Clause forbids only intentional discrimination. *Washington v. Davis*, 426 U.S. 229, 96 S.Ct.

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[10] After oral argument, and as part of a petition for rehearing, the court was informed for the first time that the Kentucky General Assembly enacted Ky.Rev.Stat. § 156.070(2)(a) (effective July 15, 1994), in response to which the KHSAA adopted by-law 40. Both of these developments may have an impact on the ultimate solution of the problems presented in this case, and are matters to be considered by the trial court on remand.

[11] *Burrows v. Ohio High Sch. Athletic Ass'n*, 891 F.2d 122, 125-26 (6th Cir.1989); *Hamilton v. Tennessee Secondary Sch. Athletic Ass'n*, 552 F.2d 681, 682 (6th Cir.1976).

2040, 48 L.Ed.2d 597 (1976). When a facially neutral rule is challenged on equal protection grounds, the plaintiff must show that the rule was promulgated or reaffirmed because of, not merely in spite of, its adverse impact on persons in the plaintiff's class. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979). "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences." *Id.* The necessary showing of intent may be made in a variety of ways. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-68, 97 S.Ct. 555, 562-65, 50 L.Ed.2d 450 (1977). Disproportionate impact, though not irrelevant, "is not the sole touchstone of . . . discrimination." *Davis*, 426 U.S. at 242, 96 S.Ct. at 2049.

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action – whether it "bears more heavily on one race than another," – may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare.

Arlington Heights, 429 U.S. at 266, 97 S.Ct. at 564 (citations and footnote omitted). The Court has made clear that the type of impact sufficient in itself to prove intentional discrimination is that which is significant, stark, and

unexplainable on other grounds. *Id.* (*citing Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) (boundary change to city, eliminating all but five of 400 black voters from city); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (ordinance enforced against laundries owned by Chinese citizens)).

Plaintiffs did not allege that defendants adopted or adhered to the 25 percent rule because of rather than in spite of its disparate impact on females. Nor did they come forward with evidence of discriminatory intent, such as a tainted historical background of the rule, or a circumstantially suspicious sequence of events leading up to the rule. *See Arlington Heights*, 429 U.S. at 267-68, 97 S.Ct. at 564-65. In short, plaintiffs claimed only that sheer disparate impact was sufficient to demonstrate an equal protection violation. This simply was not enough to defeat the defendants' motion for summary judgment. Accordingly, we affirm that aspect of the court's ruling.

We REVERSE the judgment against plaintiffs on their Title IX claim, and AFFIRM the judgment against plaintiffs on their equal protection claim, and REMAND for further proceedings consistent with this opinion.

BATCHELDER, Circuit Judge, dissenting in part.

The majority affirms the grant of summary judgment on the equal protection claim but reverses the grant of summary judgment on the Title IX claim. I agree that the plaintiffs did not describe a wrong of constitutional magnitude, but because I think the plaintiffs in this case did

not present a *prima facie* case of a Title IX violation, I respectfully dissent.

Throughout the majority opinion appear comments on the absence of evidence in the record on pivotal issues. For example, on the issue of statistical disparity between student population and student participation in athletics, the majority writes, "Although the record is silent on this point, the court was informed at oral argument that 33,891 boys (65 percent) participate in sanctioned sports in Kentucky, while only 18,860 girls (34.8 percent) participate." *See* maj. op. at 275 n. 8. On the issue of whether there exists an unmet interest in participation among the underrepresented sex, the majority states that "the level of interest of all high school girls in fast-pitch softball is unknown," impliedly because KHSAA distributed its survey to member schools without requiring polling of female students. Maj. op. at 274; *see also* maj. op. at 273.

In these comments and others, the majority necessarily concedes that the plaintiffs failed to sustain their burden of proof under Title IX. Title IX, when read with the implementing regulation and the policy interpretation, places the burden of proving statistical disparity and unmet interest squarely on the shoulders of the plaintiffs. *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 829 n. 5, 831 (10th Cir.), *cert. denied*, 510 U.S. 1004, 114 S.Ct. 580, 126 L.Ed.2d 478 (1993); *Cohen v. Brown Univ.*, 991 F.2d 888, 901-02 (1st Cir.1993). The record is silent or otherwise inadequate on the issues upon which the plaintiffs' case depends, and recitation of statistics at oral argument cannot cure the plaintiffs' earlier neglect. The district court's grant

of summary judgment on the Title IX claim should be affirmed.

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APPENDIX D

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

[Filed January 14, 1993]

No. C-92-0295-L(J)

LORI ANN HORNER, et al.
Plaintiffs,

v.

KENTUCKY HIGH SCHOOL ATHLETIC ASSOCIATION, et al.
Defendants,

MEMORANDUM

This action was brought by twelve female student athletes on behalf of themselves and a proposed class of over 4,000 girls who participate in interscholastic girls' high school slow-pitch softball in the Commonwealth of Kentucky. Plaintiffs complain that the defendants, the Kentucky High School Athletic Association ("KHSAA") and the Kentucky State Board for Elementary and Secondary Education ("State Board of Education") have discriminated against them on the basis of sex by refusing to sanction interscholastic fast-pitch

softball. They allege violations under 42 U.S,C. §1953, Title IX of the Education Amendments of 1972, as amended by the Civil Rights Restoration Act of 1987 (20 U.S.C. § 1681), and under State law. The defendants have moved for summary judgment and the issues have been briefed. Because today's ruling will also apply to the claims against the State Board of Education, it is unnecessary to reach the separate issues raised by that defendant.

FACTS

The State Board of Education has the exclusive management and control of all the common schools in the state of Kentucky and all of the programs operated in such schools, including interscholastic athletics. KRS 156,070(1). Pursuant to statute, the State Board is allowed to delegate its responsibility to manage and control the interscholastic athletic programs of the schools to an agent. KRS 156.070(2). The KHSAA has been designated as that agent. 702 KAR 7:065.

The KHSAA is a voluntary, self-managing, unincorporated association of public, private and parochial schools located in Kentucky. The member schools work through the KHSAA to regulate and develop high school athletics within the state. Member schools are required to comply with the provisions of the KHSAA Constitution and By-Laws. The rules and regulations of the association are made by representatives of the member schools, and voted on in a delegate assembly.

A number of interscholastic sports are "sanctioned" by the KHSAA. If a sport is "sanctioned", the KHSAA will

recognize and sponsor a state tournament in the sport. Before the association will sanction a new sport, the rules adopted by the association require that at least 25% of the member schools indicate a willingness to participate. Once sanctioned, a sport must continue to show at least 15% participation of member schools to remain sanctioned. The KHSAA does not prohibit member schools from participating in non-sanctioned sports.

Girls' slow-pitch softball was sanctioned by the KHSAA for the first time during the 1982-83 academic year after a 1981 survey of member schools showed greater than 25% support. Girls fast-pitch softball is not a sanctioned sport. The member schools were polled in 1988 concerning fast-pitch and only 9% of the schools indicated they would participate. The survey was conducted again in 1992 with a 17% positive response. The KHSAA refuses to sanction fast pitch softball ostensibly because interest is insufficient.

The plaintiffs claim they are being discriminated against. The gravamen of their complaint is that fast-pitch is the predominant softball sport played by women on the collegiate level. They contend collegiate scholarships to play fast-pitch are awarded only to women who have demonstrated their skills in a high school program. Therefore, the plaintiffs claim they are being denied the opportunity to compete for scholarships, jobs and other athletic opportunities which are afforded to boys who participate in baseball. Further, plaintiffs contend that, because the KHSAA sanctions 10 sports for boys and only 8 for girls, they are being denied equal athletic opportunities.

The KHSAA has moved for sumnmry judgment on all of plaintiff's claims. Aside from the substantive arguments pitched by the defendant, they contend that this court lacks jurisdiction due to the plaintiffs' failure to exhaust administrative remedies. The argument is out in left field. It is well established that exhaustion of administrative remedies is not necessary to bring a § 1983 claim. Pasty v. Board of Regents of the State of Florida, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). Likewise, there is no exhaustion requirement under Title IX. Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d. 560 (1979). Further, it appears that administrative appeal of this matter would be futile. The court has jurisdiction over the plaintiffs' federal claims.

EQUAL PROTECTION

The plaintiffs' claim of denial of equal protection under the Fourteenth Amendment to the United States Constitution must be brought pursuant to 42 U.S.C. § 1983. To proceed with a cause of action under § 1983 a plaintiff must show that the conduct complained of was committed by a person acting under color of state law and that the challenged conduct deprived the person of rights, privileges or immunities secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981). There is no doubt that the actions of high school athletic associations are under color of law. Jones v. Oklahoma Secondary Sch. Activities Ass'n, 453 F.Supp. 150 (W.D.Okla. 1977). However, the plaintiffs fail to show a deprivation of constitutional dimension.

The plaintiffs' constitutional claim is strictly one of sex discrimination in violation of the equal protection clause of the Fourteenth Amendment to the Constitution. Participation in interscholastic athletics is not, *per se*, a right protected by the Constitution. Hamilton v. Secondary Sch. Athletic Ass'n, 552 P.2d 681 (6th Cir. 1976). Nor does such activity become constitutionally protected merely became the student athlete loses the opportunity to play in tournaments or compete for scholarships at the college level. Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975).

The plaintiffs fail to state an equal protection claim. The equal protection clause is implicated only when a classification treats similarly situated persons in different ways. Reed v. Reed, 404 U.S. 71, 75, 92 S.Ct, 251, 253-54 (1971). Thus, courts have found that an athletic association's role or regulation which prohibits girls from competing on boy's teams violates equal protection. Brenden v. Independent School Dist., 477 P.2d 1292 (8th Cir. 1973). Likewise, where no interscholastic male team existed, equal protection was violated by a rule excluding male participation on a girls' field hockey team. Williams v. School Dist. of Bethlehem, Pa., 799 F.Supp. 513 (E.D.Pa. 1992). However in this case is undisputed that the KHSAA does not limit female participation in any sanctioned sport.

The rule requiring 25% member school participation before a new sport will be sanctioned is gender neutral on its face and the plaintiffs present no evidence that the rule is being selectively applied in a discriminatory fashion. The KHSAA advances a legitimate rationale for the 25 % rule: It is not practical to form a state wide program in a sport if there is not sufficient interest among the member schools. The

plaintiffs do not contest that the polls conducted by the KHSAA indicated less than 25% support for fast-pitch softball. Further, the KHSAA does not prohibit individual schools from forming their own fast-pitch teams or competing with other schools. The only apparent impact of fast-pitch being non-sanctioned is the lack of a State sponsored tournament and the resultant diminished opportunity for college scholarships in fast-pitch softball. Neither effect rises to the level of a constitutional violation. Hamilton, supra.; Parish, supra. In short, the court fails to find any evidence of gender based discrimination on the face of the rule or in its application.

The court also rejects the implication that the Constitution requires the KHSAA to sanction separate, equal programs for each sex on a team for team basis. Even if such a requirement were found to exist in this particular case, the KHSAA does sanction girls baseball in the form of slow-pitch, which apparently enjoys greater support among the member schools. The distinction between the two games is a matter of rule differences. While there may be important and substantial benefits for females in playing sanctioned fast-pitch softball rather than slow-pitch, it is not a matter of constitutional importance. The KHSAA allows competition in sanctioned sports without gender resection and that satisfies the requirements of equal protection.

TITLE IX

The plaintiffs claim that the actions of the defendants violate Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. § 1681 et seq. Title IX prohibits gender discrimination in education programs or activities receiving

federal financial assistance. The regulations promulgated under the statute specifically apply Title IX to athletic programs. 45 C.F.R. § 86.41. Contrary to the argument of the KHSAA, Title IX and the implementing regulations can be violated without showing a specific intent on the part of the educational institution to discriminate against women. Haffeer v. Temple University of Commonwealth System of Higher Education, 678 F.Supp. 517, 539 (E.D.Pa. 1987).

There is some question whether Title IX applies to these defendants. The defendants claim they are not "recipients" of federal financial assistance and so are not subject to Title IX. It is undisputed that the KHSAA receives no direct federal funding. However, it does receive money in the form of dues from a number of member schools which do receive such assistance. Under the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984), Title IX would not reach these defendants because the alleged discrimination must occur in the specific program which receives federal financial assistance. Using the same approach, the Sixth Circuit found that a state high school athletic association was not a recipient for Title IX purposes in Yellow Springs Etc. v. Ohio High Sch. Ath. Ass'n, 647 F.2d 651 (6th Cir. 1981). Most recently, the programmatic approach was applied to an athletic association in Kleczek v. Rhode Island Interscholastic League, 768 F.Supp. 951 (D.R.I. 1991).

The Plaintiffs contend that Congress implicitly overruled the programmatic approach when it enacted the Civil Rights Restoration Act of 1987 in favor of institution wide application. There is support for this conclusion not only in the language of the amendment, but also in the recent

decision, Franklin v. Gwinnett County Public Schools, 503 U.S. ___, 112 S.Ct. 1028 (1992), where the Court recognized that Congress intended to broaden the coverage of Title IX. The court finds it unnecessary to decide the challenge to the continued validity of cases like Yellow Springs, because even if applied, Title IX offers no redress.

The question of whether the KHSAA's program offends the requirements of Title IX is resolved by reference to the regulations promulgated under the statute which explicitly deal with athletics and separate sex teams. Those regulations define the parameters of Title IX's scope in the area of interscholastic athletics. The portion of the regulations dealing with separate teams, 45 C.P.R. § 86.41(b) states:

> ". . . [A] recipient may operate or sponsor separate reams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be, allowed to try-out for the team offered unless the sport involved is a contact sport. . . .

Clearly, there is no mandatory requirement for separate teams in the regulation. In fact, the text anticipates the situation where separate teams are not offered and requires

only that the excluded sex be allowed to try-out for the offered team in non-contact sports. At best, the regulation is neutral with regard to separate teams in contact sports. If any basis exists to apply Title IX in the present situation, it must be found in the statute's concept of "equal athletic opportunity".

The regulations contain a separate provision regarding equal opportunity in athletics. Section 106.41(c) directs:

> A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:
>
> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
>
> . . .

The plaintiffs in this case are competitive athletes, some of whom are undoubtedly capable of advancing to the collegiate level of play in their chosen sport. However, equal athletic opportunity under Title IX does not mean that every athlete be sponsored in his or her sport of choice. The evidence presented fails to raise a sufficient question that girls are being denied equal athletic opportunity under Title IX's standards. Females may compete on baseball teams of the member schools and in a sanctioned slow-pitch league. It is undisputed that girls' fast-pitch softball failed to garner

sufficient interest to acquire sanctioned status under preexisting rules of the association, while slow-pitch exhibited a broader base of support. Thus, the evidence shows that the current program offers females an unrestricted opportunity to compete, and a choice of competitive level based on the interests of the member schools. Title IX does not require more.

Fast-pitch softball is presumably more competitive and demanding than slow-pitch. While it is possible that some females would derive greater individual benefit through fast-pitch competition, it is not unlikely that the less competitive sport allows a greater number of girls to enjoy the benefits of interscholastic athletic competition. The court does not read Title IX's objective to be focused on providing a forum for scholarship competition, but rather on providing equal opportunity for broad participation according to the interest and abilities of each sex. To the extent that slow-pitch underemploys these plaintiff's, skills or limits their opportunities for advancement in their particular chosen sport, the problem is beyond the reach of Title IX and their complaint must be addressed within the member schools of the athletic system, by the collegiate recruitment system, or by further act of Congress. The court concludes that the KHSAA not only offers equal opportunity to compete, but also is effectively accommodating the interests and abilities of both sexes as required by Title IX.

STATE LAW

The plaintiff asserts pendant state law claims under Kentucky's Constitution and KRS 344.020(1)(b). The court will exercise its discretion to dismiss those claims. Williams

v. City of River Rouge, 909 F.2d 151 (6th Cir. 1990). Having found the federal claims to be without merit, this court is not the proper umpire for the present conflict. The case will be dismissed.

An appropriate order has been entered this 11th day of January, 1993.

/s/_____
Edward H. Johnstone, Judge
United States District Court